



PROFITING OFF PAIN

Privatized Detention, Mass Surveillance and the
Drive for Immigrant Prosecutions



**NATIONAL
IMMIGRATION
PROJECT**

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ABOUT THE AUTHORS

ABOUT THE AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, IMMIGRANT JUSTICE CLINIC

The Washington College of Law Immigrant Justice Clinic provides representation on a broad range of cases and projects, serving migrants and their communities in the D.C. metropolitan area, the greater United States, and beyond. Student attorneys handle matters that develop core lawyering skills, such as interviewing, counseling, negotiation, and trial advocacy, while cultivating complementary skills in the areas of policy and legislative advocacy, community organizing, and working with the media.

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The National Immigration Project is a membership organization of attorneys, advocates, organizers and community members working toward a compassionate and humane immigration system. We litigate, advocate, educate, and build bridges across movements to ensure that those most impacted by the immigration and criminal systems are uplifted and supported. We envision a world in which everyone can live freely and thrive without fearing for their lives, health, security, or their ability to remain where they are; freedom of movement is welcomed and not feared; and systems of support that honor the experience of migration replace our current policies of enforcement, detention, incarceration, and criminalization. Learn more at nipnlg.org. Follow the National Immigration Project @nipnlg.

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EXECUTIVE SUMMARY¹

Sections 1325 and 1326 of Title 8 of the United States Code (hereinafter Sections 1325 and 1326) enable criminal prosecution of migrants who enter or re-enter the United States without permission. The criminalization of irregular entry and re-entry under Sections 1325 and 1326 evolved from a series of racist, nativist policies from the 20th century that continue to shape our current laws.² While immigrant rights advocates have, for decades, called for the end of prosecutions of irregular entry and re-entry, the forces of privatized detention and surveillance perpetuate the reliance on Sections 1325 and 1326, ostensibly to deter migration.³

Migration data reveal, however, that attempts to deter irregular arrivals through prosecution and other punitive measures are ineffective.⁴ Further, the effects of criminal prosecution under Sections 1325 and 1326 are devastating to migrants.⁵ In addition to civil-administrative immigration consequences, such as deportation and limited opportunities for lawful settlement, prosecution under these provisions subjects defendant migrants to long periods of incarceration and compels the separation of migrant families. Certain communities bear the burden of these consequences: data collected by the United States Department of Justice (DOJ) demonstrates that prosecutions under Sections 1325 and 1326, which are some of the most frequently lodged prosecutions in federal court, disproportionately impact people of Latino backgrounds.⁶

The privatization of the immigration and criminal carceral systems in the United States, and its inherent profit motive, exacerbates the harmful effects of Section 1325 and 1326 prosecutions. Inhumane conditions and detention are direct impacts of the privatization of immigration detention centers and prisons that Section 1325 and 1326 perpetuate. Immigration and Customs Enforcement (ICE) and the Federal Bureau of Prisons (BOP) contract with private prison companies to operate immigration detention centers and federal prisons, respectively. These private for-profit entities spend millions of dollars lobbying for immigration policies that incentivize the apprehension, detention, and prosecution of migrants. These policies, in turn, lead to more detention, which enable greater spending on lobbying efforts.

1 Publication of the American University Washington College of Law Immigrant Justice Clinic and National Immigration Project, 2026. This report is released under a Creative Commons Attribution 4.0 International License (CC BY 4.0).

2 See Jesse Franzblau, *A Legacy of Injustice: The U.S. Criminalization of Migration*, NAT'L IMMIGR. JUST. CTR. (Jul. 23, 2020), <https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration> [https://perma.cc/NR3G-R8WJ]; NAT'L IMMIGR. PROJECT, *Equal Protection Challenges to Prosecutions Under 1325 & 1326: The Groundbreaking Decision in United States v. Carillo-Lopez* (Dec. 21, 2021), <https://nipnlg.org/work/resources/equal-protection-challenges-prosecutions-under-1325-1326-groundbreaking-decision> [https://perma.cc/ND64-2KPH]; Brief of Legal Service Providers and Immigrant Rights Organizations as Amici Curiae in Support of Appellant, *United States v. Rodriguez-Barios*, No. 21-50145, 2023 WL 3581954 (9th Cir. May 22, 2023), <https://nipnlg.org/work/resources/united-states-v-rodriguez-barios> [https://perma.cc/PU5U-WA8V].

3 See Judith A. Greene, Bethany Carson, & Andrea Black, *Indefensible: A Decade of Mass Incarceration of Migrants Prosecuted For Crossing the Border*, GRASSROOTS LEADERSHIP & JUST. STRATEGIES (Jul. 2016), <https://justicepower.org/project/indefensible-a-decade-of-mass-incarceration-of-migrants-prosecuted-for-crossing-the-border> [https://perma.cc/4H4Q-KCEX]; see also The New Way Forward Act, H.R. 2374, 118th Cong. (2023).

4 See Jesse Franzblau, *Five Ways that Immigration Prosecutions Are Ineffective and Deadly*, NAT'L IMMIGR. JUST. CTR. (July 19, 2022), <https://immigrantjustice.org/staff/blog/five-ways-immigration-prosecutions-are-ineffective-and-deadly> [https://perma.cc/8ZSU-SPSU].

5 See *id.*; NAT'L IMMIGR. PROJECT, *Rooted in Racism: The Human Impact of Migrant Prosecutions* (Dec. 2021), <https://nipnlg.org/work/resources/rooted-racism-human-impact-migrant-prosecutions> [https://perma.cc/PMV2-J9ZQ]; Amicus Brief, *supra* note 2.

6 NAT'L IMMIGR. PROJECT & NAT'L IMMIGR. JUST. CTR., *Immigration Prosecutions By the Numbers* (Nov. 14, 2022), <https://nipnlg.org/work/resources/immigration-prosecutions-numbers> [https://perma.cc/MF9K-3FS2] (hereinafter "*Immigration Prosecutions By the Numbers*"); Brief for Amici Curiae Advocates for Basic Legal Equality, Justice Strategies, LatinoJustice PRLDEF, Legal Aid Justice Center, Massachusetts Law Reform Institute, and National Immigration Law Center in Support of Appellant, *United States v. Rodriguez-Barios*, No. 21-50145, 2023 WL 3581954 (9th Cir. May 22, 2023). See NAT'L IMMIGR. JUST. CTR., *supra* note 2; NAT'L IMMIGR. PROJECT, *supra* note 2; Amicus Brief, *supra* note 2.

Additionally, the criminalization of entry and re-entry enables and normalizes the use of invasive surveillance technologies and the collection of sensitive data on citizens and noncitizens alike in the name of national security and immigration enforcement.⁷ In so doing, the criminalization of migration further erodes civil liberties and constitutional protections. Expansive enforcement, coupled with scant Congressional and judicial oversight, subjects noncitizens and citizens to surveillance and criminal prosecution with minimal procedural safeguards.

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Privatized detention, incarceration, and surveillance are mutually reinforcing. The use of invasive surveillance technologies is enabled by the criminalization of unlawful entry and re-entry. The government purports that its use of digital and biometric surveillance ensures that individuals subject to Sections 1325 and 1326 will be detected and apprehended. However, these invasive tactics ultimately serve the interests of privatized detention by filling detention beds with noncitizens.⁸ Over time, the private prison and surveillance industries have begun to converge. Motivated by profit, each of these industries contribute to the large number of Section 1325 and 1326 prosecutions.

The current impacts of Sections 1325 and 1326 are significant. However, as the second Trump administration proceeds, the harms highlighted in this report will undoubtedly worsen. Two of the more than a dozen immigration-related executive orders signed by President Trump on the first day of his presidency touched on prioritizing criminal prosecutions related to unauthorized entry into the United States.⁹ Even when the number of migrant encounters at the border dropped sharply in January 2025,¹⁰ President Trump's then-acting Deputy Attorney General ordered U.S. Attorney's Offices to divert federal prosecutors from their typical duties to prosecute immigration cases.¹¹ A February 2025 Attorney General memorandum to prosecutors lists prosecution of criminal immigration laws as the top priority for federal prosecutors, requires federal prosecutors to pursue charges presented to them by federal, state, and local law enforcement, and mandates that prosecutors report out anytime they decline to pursue these charges.¹² Further, in June 2025, the Deputy Attorney General issued a memorandum opinion concluding that "[e]luding inspection

7 See Amanda Chavez, *Palantir Played Key Role In Arresting Families for Deportation, Document Shows*, MIJENTE (May 2, 2019), <https://mijente.net/blog/palantir-arresting-families> [https://perma.cc/JKD6-NHA5]; see also #NoTechForICE, <https://notechforice.com/about> [https://perma.cc/3SWA-RZ4C] (last visited Dec. 2, 2025); Cris Batista, *The Fight Against Big Tech's Impact on Deportations*, MIJENTE (Aug 7, 2025), <https://mijente.net/blog/the-fight-against-big-techs-impact-on-deportations/> [https://perma.cc/8MNH-AAHT].

8 Emily Medina, *Bed Mandates and Corporate Profits: Tracing the Privatization and Expansion of Immigration Detention in the United States*, THE FLAW (May 9, 2023), <https://theflaw.org/articles/bed-mandates-and-corporate-profits/> [https://perma.cc/Q3BN-XGZL] (last visited Dec. 2, 2025); see also DET. WATCH NETWORK, *Detention Quotas*, <https://www.detentionwatchnetwork.org/issues/detention-quotas> [https://perma.cc/2Z6H-VESL] (last visited Dec. 2, 2025).

9 Exec. Order No. 14165, 90 Fed. Reg. 8467 (Jan. 20, 2025); Exec. Order No. 14159, 90 Fed. Reg. 8443 (Jan. 20, 2025).

10 Adam Isacson, *Weekly U.S.-Mexico Border Update: January 2025*, WASH. OFF. ON LATIN AM. (Feb. 21, 2025), <https://www.wola.org/2025/02/weekly-u-s-mexico-border-update-january-drop-darien-gap-panama-and-costa-rica-guantanamo-budget/> [https://perma.cc/Q7FQ-Q6P3].

11 Ben Penn, *Trump DOJ Leader Said to Order Prosecutors Moved to Border*, BLOOMBERG LAW (Jan. 30, 2025), <https://news.bloomberglaw.com/us-law-week/trump-doj-leader-said-to-order-prosecutors-transferred-to-border> [https://perma.cc/CU4E-B9Y9].

12 Att'y Gen., Memorandum, General Policy Regarding Charging, Plea Negotiations, and Sentencing (Feb. 5, 2025), <https://www.justice.gov/ag/media/1388541/dl> [https://perma.cc/PE9B-ZKAS]; see also Acting Deputy Att'y Gen., Memorandum, Interim Policy Changes Regarding Charging, Sentencing, and Immigration Enforcement (Jan. 21, 2025), <https://immpolicytracking.org/policies/doj-memo-creates-new-prosecutorial-discretion-guidelines-and-directs-the-fbis-joint-terrorism-task-force-to-redeploy-doj-resources-and-personnel-for-immigration-enforcement/> - /tab-policy-documents [https://perma.cc/F3GH-WVHR].

under 8 U.S.C. § 1325(a)(2) is a continuing offense.”¹³ This memorandum rescinded prior guidance that had instructed prosecutors to charge individuals under Section 1325 only when present at a point of entry; instead, the new memorandum urged prosecutors to disregard the location of an individual’s immigration encounter.¹⁴

The February 2025 memorandum from the Attorney General included something surprising—reference to 8 U.S.C. §§ 1304 and 1306, two previously dormant provisions of federal immigration law that permit the criminal prosecution of noncitizens who fail to register with the federal government (section 1306) or fail to produce evidence of their registration when stopped by a federal agent (section 1304).¹⁵ These laws, enacted during World War II, were resuscitated by an interim final rule that was published on March 12, 2025, which provides a form for immigrants who are not already registered to comply with these laws.¹⁶ While it is too soon to tell how prevalent the prosecution of these registration-related crimes will be, their reinvocation is clearly part of the administration’s efforts to criminalize noncitizen status in the United States.¹⁷ Indeed, it is now more important than ever to understand the harms of migrant prosecutions, privatized detention, and surveillance, as these will be top priorities for the current administration.¹⁸ While this report focuses on the criminalization of migration under Sections 1325 and 1326, the same principles laid out in this report on the profit motives of the carceral and surveillance industries would apply if an uptick in Section 1304 and 1306 prosecutions materializes.

BACKGROUND

Overview and History of the Criminalization of Entry

In addition to imposing civil immigration-related penalties against noncitizens, United States law imposes criminal penalties on certain immigration-related conduct, including irregular entry and re-entry.¹⁹ The crime of “improper entry,” codified at 8 U.S.C. § 1325, imposes criminal penalties on individuals who enter the country between ports of entry.²⁰ Section 1325 also criminalizes those who make false statements while entering or attempting to enter the United States.²¹ A first offense under this provision is a misdemeanor punishable by a fine, up to six months in prison, or both.²²

¹³ Whether Eluding Inspection Under 8 U.S.C. S 1325(a)(2) Is A Continuing Offense, 49 Op. O.L.C. (June 21, 2025) (slip op.), <https://www.justice.gov/olc/media/1404581/dl> [https://perma.cc/KJP3-4UEV].

¹⁴ See *id.* at 18.

¹⁵ AM. IMMIGR. COUNCIL, *The Trump Administration’s Registration Requirement for Immigrants* (Feb. 26, 2025), <https://www.americanimmigrationcouncil.org/research/trump-administration-registration-requirement-immigrants> [https://perma.cc/362G-9AEX]; NAT’L IMMIGR. LAW CTR., *FAQ: The Trump Immigration Registration Requirement* (Apr. 10, 2025), <https://www.nilc.org/resources/faq-the-trump-immigration-registration-requirement/> [https://perma.cc/S8AT-ZRFX].

¹⁶ Alien Registration Form and Evidence of Registration, 90 Fed. Reg. 11793 (Mar. 12, 2025) (to be codified at 8 C.F.R. pt. 264).

¹⁷ See Richard Ruelas, *In apparent first in Phoenix, feds charge migrant for not declaring his unlawful presence in US*, THE ARIZONA REPUBLIC (Apr. 19, 2025), <https://www.azcentral.com/story/news/politics/immigration/2025/04/19/phoenix-man-charged-by-feds-for-not-registering-as-alien-in-us/83165670007/> [https://perma.cc/94U5-4FGK].

¹⁸ See AM. PRESIDENCY PROJECT, *Republican Party Platform, 2024 GOP Platform: Make America Great Again!* (July 8, 2024), <https://www.presidency.ucsb.edu/documents/2024-republican-party-platform>. [https://perma.cc/GA9D-P36C] (declaring that Republicans will use advanced technology to monitor and secure the border, shifting massive portions of federal law enforcement to immigration enforcement, and increasing penalties for illegal entry). See generally PAUL D’ANIS & STEVEN GROVES, EDs., *MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE*, THE HERITAGE FOUNDATION (2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf [https://perma.cc/VR56-E7Z6].

¹⁹ 8 U.S.C. §§ 1325, 1326.

²⁰ 8 U.S.C. § 1325.

²¹ *Id.*

²² *Id.*

In a similar vein, 8 U.S.C. § 1326 criminalizes irregular re-entry, making it a crime to attempt to re-enter the United States, or to be found in the United States after having been deported, ordered removed, or denied admission.²³ This crime is a felony with a maximum sentence of two years in prison.²⁴ Higher penalties, including up to a twenty-year prison sentence, apply if the person was previously removed after having been convicted of certain crimes.²⁵

Criminal prosecutions under Sections 1325 and 1326 have clear geographical and racially disparate impacts. Data collected and published by the DOJ demonstrates that Latinos are disproportionately prosecuted under the two provisions.²⁶ Approximately 96 percent of individuals charged with unauthorized entry or re-entry in fiscal year 2024 are from Latin American countries.²⁷ In addition to being charged under Sections 1325 and 1326 at higher rates than other migrants, Latino migrants are also more likely to be convicted.²⁸

In terms of geography, significantly more criminal prosecutions under sections 1325 and 1326 take place in states along the United States-Mexico border (Texas, Arizona, New Mexico, California) than in states along the northern border with Canada.²⁹ In fiscal year 2024, for example, nearly 89 percent of Section 1326 prosecutions took place in Texas, Arizona, New Mexico, and southern California.³⁰

This disparity can be attributed, in part, to Operation Streamline, a program initiated in 2005 by the U.S. Department of Homeland Security (DHS) and the DOJ.³¹ Operation Streamline accelerated the resolution of criminal prosecutions for irregular entry and re-entry.³² It did so by consolidating several steps of a typical federal criminal case and allowed proceedings where as many as eighty defendants were tried in a single hearing.³³ Defendants typically plead guilty to illegal entry or illegal re-entry *en masse*.³⁴ Although Operation Streamline is no longer in effect, vestiges of the

23 8 U.S.C. § 1326.

24 *Id.*

25 See *id.* Penalties for individuals previously removed after having been convicted of certain crimes include: up to ten years in prison for a single felony conviction (other than an aggravated felony conviction) or three misdemeanor convictions involving drugs or crimes against a person, and up to twenty years in prison for an aggravated felony conviction. *Id.*

26 See generally U.S. DEP'T OF JUST., *Prosecuting Immigration Crimes Report* (hereinafter "PICR") (2025), <https://www.justice.gov/usao/resources/PICReport> [<https://perma.cc/EH8J-L3WA>].

27 For purposes of this calculation, Latin American countries include the following: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, Suriname, Uruguay, and Venezuela. See U.S. DEP'T OF JUST., 8 U.S.C. §1325 MG FY24 Monthly Defs. Filed with Nationality 6–8, <https://www.justice.gov/usao/media/1373441/dl> [<https://perma.cc/QQ8E-6WKV>] (last visited Nov. 7, 2025) (accounting misdemeanor and petty offense charges under section 1325 in federal magistrate court by nationality); U.S. DEP'T OF JUST., 8 U.S.C. §1325 DC FY 24 Monthly Defs. Filed with Nationality 6–7, <https://www.justice.gov/usao/media/1373426/dl> [<https://perma.cc/7D7X-569Y>] (last visited Nov. 7, 2025) (illustrating the number of defendants charged in district court by nationality); U.S. DEP'T OF JUST., 8 U.S.C. §1326 FY24 Monthly Defs. Filed with Nationality 13–15, <https://www.justice.gov/usao/media/1373451/dl> [<https://perma.cc/WTJ9-87YJ>] (last visited Nov. 7, 2025) (illustrating the number of defendants charged with unlawful re-entry in district court by nationality).

28 NAT'L IMMIGR. PROJECT & NAT'L IMMIGR. JUST. CTR., *Immigration Prosecutions By the Numbers*, *supra* note 6 (citing PICR data that 99 percent of people sentenced under section 1326 and 93 percent of people sentenced under section 1325 in FY2021 were Latino).

29 See generally U.S. DEP'T OF JUST., *supra* note 26.

30 U.S. DEP'T OF JUST., 8 U.S.C. §1326 FY24 Monthly Defs. Filed, <https://www.justice.gov/usao/media/1373446/dl> [<https://perma.cc/7D7X-569Y>] (last visited Dec. 1, 2025) (specifically, 16,793 Section 1326 prosecutions out of a yearly total of 18,883 took place in Arizona, Southern California, New Mexico, and Texas).

31 NAT'L IMMIGR. F., *Fact Sheet: Operation Streamline*, (Sep. 2020), <https://forumtogether.org/wp-content/uploads/2020/09/Streamline-Fact-Sheet-FINAL-1.pdf> [<https://perma.cc/BM4R-RAYG>].

32 See Eleanor Acer, *Criminal Prosecutions and Illegal Entry: A Deeper Dive*, JUST SEC. (Jul. 18, 2019), <https://www.justsecurity.org/64963/criminal-prosecutions-and-illegal-entry-a-deeper-dive/> [<https://perma.cc/F95F-RNZK>].

33 See NAT'L IMMIGR. F., *supra* note 31.

34 *Id.*

program persist in today's criminal prosecutions for irregular entry and re-entry.³⁵

These recent racial and geographic trends in prosecutions under Sections 1325 and 1326 reflect the provisions' original racially motivated history.

These recent racial and geographic trends in prosecutions under Sections 1325 and 1326 reflect the provisions' original racially motivated history. Criminal entry and re-entry laws were first passed in the late 1920s at the height of the twentieth-century nativist and eugenics movements.³⁶ The Immigration Act of 1924, also known as the Johnson-Reed Act,

limited the number of immigrants allowed entry into the United States based on a national origins quota system.³⁷ This quota system was designed to ensure that the racial makeup of the United States remained majority white by pegging the number and proportion of annual immigrants to the ethnic makeup of the U.S. population based on the 1890 national census.³⁸ Indeed, Representative Albert Johnson, an author of the legislation, stated:

[W]ith this new immigration act the United States is undertaking *to regulate and control the great problem of the commingling of races. Our hope is in a homogeneous Nation.* At one time we welcomed all, and all helped to build the Nation. But now asylum ends. The melting pot is to have a rest. This Nation must be as completely unified as any nation in Europe or in Asia. Self-preservation demands it.³⁹

The Act imposed restrictions that disadvantaged nonwhite immigrants. In particular, the 1924 law effectively excluded all Asian immigrants, eliminating exceptions to the "Asiatic Barred Zone" that had been instituted in 1917.⁴⁰ The Act further required other immigrants who were potentially eligible for entry to submit to inspection at U.S. immigration stations, where they were subjected to literacy tests, health exams, and fees.⁴¹ In practice, inspection procedures have historically reflected racial and classist approaches to migration control.⁴² At its core, the Immigration Act of 1924 endeavored to preserve white racial homogeneity.

The Immigration Act of 1924 did not, however, fully satisfy Nativists' anti-Mexican goals. Nativist lawmakers sought to restrict or end immigration to the United States from every region of the

35 See Michael Corradini, et al., *Operation Streamline: No Evidence that Criminal Prosecution Deters Migration*, VERA INST. OF JUST. (Jun. 2018), https://www.vera.org/downloads/publications/operation_streamline-report.pdf [https://perma.cc/TJU6-KEAD].

36 See NAT'L HUM. GENOME RSCH. INST., *Fact Sheet: Eugenics and Scientific Racism* (May 18, 2022), <https://www.genome.gov/about-genomics/fact-sheets/Eugenics-and-Scientific-Racism> [https://perma.cc/8U8C-BPYJ].

37 Immigration Act of 1924 ("Johnson-Reed Act"), Pub. L. No. 68-139, 43 Stat. 153; DEP'T OF STATE, OFF. OF THE HISTORIAN, *The Immigration Act of 1924 (The Johnson Reed Act)*, <https://history.state.gov/milestones/1921-1936/immigration-act> [https://perma.cc/NLK7-MQVT] (last visited Dec. 2, 2025).

38 See DEP'T OF STATE, OFF. OF THE HISTORIAN, *supra* note 37.

39 65 Cong. Rec. 10512 (Jun. 4, 1924) (statement of Rep. Johnson) (emphasis added).

40 See DEP'T OF STATE, OFF. OF THE HISTORIAN, *supra* note 37.

41 See KELLY LYTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965* 131 (Heather Ann Thompson et al. eds. 2017); see also Johnson-Reed Act, *supra* note 37.

42 The opening of the Angel Island Immigration Station in 1910 led to formal screening of individuals seeking to enter the United States. Aaron Korthius, *Detention and Deterrence: Insights from the Early Years of Immigration Detention at the Border*, 133 YALE L. J. F. 238 (Nov. 25, 2019), <https://www.yalelawjournal.org/forum/detention-and-deterrence> [https://perma.cc/CF84-NHFL]. Generally, wealthy white passengers were permitted to land (i.e., exit oceanliners) without inspection at the Station while lower-class and Chinese passengers were transported and detained at Angel Island for more rigorous inspection. See HERNÁNDEZ, *supra* note 41 (citing ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA 1882-1943*, at 2-4 (2003)).

world, but failed to exclude individuals from the Western Hemisphere in this legislation.⁴³ This was part of a compromise struck between Nativists in Congress and members of Congress from Western states, who were under heavy pressure from business interests to keep the flow of Mexican labor open.⁴⁴ In the early twentieth century, Mexican immigrant laborers had established communities along the borderlands between the United States and Mexico, and by the 1920s, Mexicans made more than one million border crossings per year.⁴⁵ The Nativist movement saw Latino communities as a threat to its goal of restricting immigration to select Europeans and perceived Mexicans, in particular, as “racially unfit for [U.S.] citizenship.”⁴⁶ But business had become reliant on Mexican labor.

Senator Coleman Livingston Blease of South Carolina proposed criminalizing unlawful entry, shifting the dialogue from imposing quotas on lawful immigration.⁴⁷ The proposal satisfied Nativists in Congress, who understood that Mexicans, who regularly crossed the border without authorization, would be particularly vulnerable to prosecution.⁴⁸ It satisfied business interests in the West, who were content with a system that punished unlawful entry, so long as their Mexican labor pool was undisturbed.⁴⁹ Ultimately, criminal entry and re-entry provisions were incorporated into the Undesirable Aliens Act of 1929.⁵⁰

When debating the Undesirable Aliens Act, members of Congress were forthright in discussing the Act’s purpose: to target Latino immigrants for punishment and deportation on account of their race.⁵¹ For instance, Representative Charles Edwards declared that:

Hordes of undesirable immigrants from Mexico are coming into the United States . . . Let’s be just and fair to our own Republic and not poison her institutions with the riff-raff and scum of other countries who will not, and can not, from the very nature of things, become one of us because they have no conception of Americanism.⁵²

Immediately after the Act’s passage, the federal government began prosecuting Mexican and Latino immigrants.⁵³ Eric Fish observes that in the “1930 Attorney General Report, 7,001 federal

43 See HERNÁNDEZ, *supra* note 41, at 132. Rather than implementing a comprehensive worldwide quota system, under pressure from western lawmakers representing a constituency of employers heavily dependent on Mexican labor, the Nativists accepted a Western Hemisphere Exemption to the quota system in exchange for the Act’s otherwise stringent restrictions. See *id.* at 134. Following the Immigration Act of 1924, Nativists repeatedly introduced bills attempting to add Mexicans to the quota system. *Id.* at 135.

44 See *id.* at 134.

45 See *id.*

46 See *id.* (citing Natalia Molina, *In a Race All Their Own: The Quest to Make Mexicans Ineligible for U.S. Citizenship*, 79 PAC. HIST. REV. 167 (2010); Mark Reisler, *Always the Laborer, Never the Citizen: Anglo Perceptions of the Mexican Immigrant during the 1920s*, 45 PAC. HIST. REV. 231 (1976)).

47 See HERNÁNDEZ, *supra* note 41, at 138. Senator Blease, a former Governor of South Carolina, espoused profoundly racist ideals. Aside from justifying the lynching of Black men, Blease had been observed publicly engaging in celebratory dances after observing some lynchings, and once stated “[w]hen mobs are no longer possible liberty will be dead.” STEPHEN KANTROWITZ, BEN TILLMAN & THE RECONSTRUCTION OF WHITE SUPREMACY 296 (2000).

48 See HERNÁNDEZ, *supra* note 41, at 138.

49 See *id.* Agribusiness interests viewed Mexican deportability as a valuable tool to access a temporary labor force. As S. Parker Frisselle, an influential farmer and lobbyist from California said before Congress, “We, in California, would greatly prefer some set up in which our peak labor demands might be met and upon the completion of our harvest these laborers returned to their country.” *Id.* (quoting Seasonal Agricultural Laborers from Mexico Before the H. Comm. On Immigr. And Naturalization, 69th Cong. 8 (1926) (statement of S. Parker Frisselle)).

50 An “act making it [a] felony with penalty for certain aliens to enter [the] United States [of America] under certain conditions in violation of law,” Pub. L. No. 70-1018, 45 Stat. 1551 (1929).

51 See also Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1056, 1086–87 (2022) (discussing the Act’s debates and asserting “[t]he congressmen who discussed the Undesirable Aliens Act made it clear that this proposal was part of the larger strategy to remove Latin Americans on racial grounds.”).

52 70 Cong. Rec. 3555 (1929).

53 Fish, *supra* note 51, at 1090.

prosecutions were brought for immigration-related crimes in 1930, compared with 1,568 in 1929.”⁵⁴ The report attributed the rise in prosecutions to the two new criminal provisions.⁵⁵

In the decades that followed, re-enactment and recodification of criminal entry and re-entry failed to purge the underlying racial animus pervading the Undesirable Aliens Act of 1929.⁵⁶ The passage of the McCarran-Walter Act of 1952 reenacted Sections 1325 and 1326.⁵⁷ While the McCarran-Walter Act removed race-based prohibitions on immigration and naturalization, it preserved the national origins quota system along with these criminal provisions.⁵⁸

In recent years, advocates have challenged Sections 1325 and 1326 by asserting that Congress enacted these laws for overtly racist purposes. In a landmark 2021 decision, Judge Miranda Du, a federal district court judge in Nevada, ruled that section 1326 violated the Fifth Amendment due to its racist origins and disproportionate impact on Latino defendants.⁵⁹ In making her decision, Judge Du turned to the historical record of immigration laws that led to the enactment of Section 1326.⁶⁰ Judge Du’s decision was quickly appealed to the Ninth Circuit Court of Appeals and overturned,⁶¹ but many immigration experts still view the decision as “groundbreaking” progress in efforts to abolish Sections 1325 and 1326.⁶²

In addition to domestic litigation, advocates have turned to international law to probe the legality of these provisions. Article 31 of the 1951 Refugee Convention prohibits States party to this instrument, including the United States, from imposing criminal penalties on certain refugees who enter without authorization,⁶³ but otherwise international law does not explicitly prohibit the use of criminal sanctions against unauthorized immigrants generally. United Nations (UN) human rights experts have cautioned against the use of criminal law to punish unauthorized entrants. Pertinently, the UN Special Rapporteur on the human rights of migrants has stated, “[i]rregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property, or national security.”⁶⁴

How Sections 1325 and 1326 Affect Migrants

Virtually all immigration-related criminal prosecutions today are referred to the relevant U.S. Attorney’s Office by DHS.⁶⁵ These prosecutions subject migrants to criminal sanctions in addition

⁵⁴ *Id.* (citing U.S. Dep’t of Just., ANNUAL REPORT OF THE ATT’YS GEN. OF THE UNITED STATES FOR THE FISCAL YEAR 1930 36–37 (1930)). Prior to the passage of the Act, it was possible to deport noncitizens who “smuggled themselves into the United States,” but the 1930 report does not distinguish whether these prior 1,568 prosecutions were criminal in nature. U.S. Dep’t of Just., ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1930 36–37 (1930).

⁵⁵ Fish, *supra* note 51, at 1090.

⁵⁶ See, e.g., Brief for Professors Kelly Lytle Hernández, et al. as Amici Curiae Supporting Respondent at 17–28, *United States v. Refugio Palomar-Santiago*, 141 S. Ct. 1615 (2021) (contending Congress’s actions leading up to the McCarran-Walter Act of 1952 were equally motivated by racial animus).

⁵⁷ Benjamin G. O’Brien, “A Very Great Penalty”: Mexican Immigration, Race, and 8 U.S.C. § 1326, 37 MD. J. INT’L L. 39, 47 (2022).

⁵⁸ *Id.*

⁵⁹ *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021).

⁶⁰ *Id.*; see also NAT’L IMMIGR. PROJECT, *supra* note 2.

⁶¹ See *United States v. Carrillo-Lopez*, 68 F.4th 1133 (9th Cir. 2023).

⁶² See Nicole Newman, *United States v. Carrillo-Lopez is Transforming Immigration Law: Will it Survive Appellate Review?*, 36 GEO. IMMIGR. L. J. 869 (2022) (citing Elie Mystal, *The Groundbreaking Decision That Just Struck a Blow to Our Racist Immigration Laws*, THE NATION (Aug. 20, 2021), <https://www.thenation.com/article/society/immigration-crime-law/> [https://perma.cc/4VY7-3PS4]).

⁶³ Convention Relating to the Status of Refugees art. 31, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization . . .”).

⁶⁴ François Crépeau (Special Rapporteur on the Human Rights of Migrants), *Rep. of the Special Rapporteur on the Human Rights of Migrants*, ¶13, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012).

⁶⁵ See NAT’L IMMIGR. JUST. CTR. & NAT’L IMMIGR. PROJECT, *Immigration Prosecutions By the Numbers*, *supra* note 6 (noting that 99 percent of all criminal prosecutions for immigration offenses in June 2022 were referred by DHS).

to civil immigration detention and deportation proceedings.⁶⁶ Individuals with an existing criminal record face increased sentences of up to twenty years if convicted under Section 1326.⁶⁷ After completing their sentence, individuals convicted under Section 1326 who do not qualify for any form of relief from removal are deported by ICE or placed into immigration custody and remain behind bars, in some cases by private prison operators.⁶⁸ Criminalization of individuals fleeing violence or persecution in their home country is problematic and can create significant negative psycho-social consequences. Criminal prosecution and incarceration delay applications for relief, exacerbate trauma or other psychological problems, and make it more difficult for people to pursue legal forms of relief.⁶⁹ These laws also harm migrant families and communities. Two of these harms—the separation of families and limitations on future immigration relief—are described below.

The Policy of Family Separation

Criminal prosecution of migrants under Sections 1325 and 1326 leads to the separation of families.⁷⁰ Family separation is especially devastating for parents with young children. As the American Immigration Council observed, an increase in “prosecutions of adult family members for entry-related offenses,” including under Sections 1325 and 1326, results in more adult family members being incarcerated and separated from their children.⁷¹

The Flores Settlement Agreement of 1997, which was the result of many years of litigation, created guidelines by which the government must abide for holding minors in immigration detention.⁷² Since its inception, the Flores Settlement Agreement has endured frequent violations.⁷³ In 2015, a renewed interpretation of the Flores Settlement Agreement held that children accompanying apprehended adults cannot be held in immigration detention for more than 20 days.⁷⁴ While the Flores Settlement Agreement favors the release of parents, if the parents are referred for prosecution under Sections 1325 and 1326, they are sent to the custody of the U.S. Marshals, and their children are placed with the U.S. Department of Health and Human Services’ Office of Refugee Resettlement (ORR) for care and custody.⁷⁵ If convicted under Sections 1325 or 1326, migrants are often held in prison for several months.⁷⁶ Following an individual’s imprisonment, their children are placed with federal authorities at shelters for unaccompanied minors or in foster homes while parents receive little or no information about their location and condition.⁷⁷

66 NAT’L IMMIGR. PROJECT, *Unauthorized Entry & Re-entry Prosecutions*, <https://ninpig.org/unauthorized-entry-re-entry-prosecutions> [https://perma.cc/8G5L-757T] (last visited Dec. 2, 2025).

67 See *id.*

68 See *id.*; see generally 8 U.S.C. § 1182(a)(9)(B) (classifying individuals unlawfully present in the United States as inadmissible).

69 See HUM. RTS. WATCH, *Turning Migrants Into Criminals: The Harmful Impact of US Border Prosecutions* 63 (May 2013), https://www.hrw.org/report/2013/05/22/turning-migrants-criminals/harmful-impact-us-border-prosecutions#_ftnref117 [https://perma.cc/9HBP-Q68W].

70 See Kevin Sieff, *The Trump Administration Used an Early, Unreported Program to Separate Migrant Families Along a Remote Stretch of the Border*, WASH. POST (July 9, 2021), <https://www.washingtonpost.com/world/2021/07/09/trump-separated-families-yuma-2017> [https://perma.cc/24XB-8EBP]; see also NAT’L IMMIGR. PROJECT, *supra* note 5.

71 See AM. IMMIGR. COUNCIL, *Prosecuting People for Coming to the United States* 1 (Aug. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf [https://perma.cc/T5EA-JC97]; NAT’L IMMIGR. PROJECT, *supra* note 5.

72 See Abbie Gruwell, *Unaccompanied Minors and the Flores Settlement Agreement: What to Know*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 30, 2018), <https://www.ncsl.org/state-legislatures-news/details/unaccompanied-minors-and-the-flores-settlement-agreement-what-to-know> [https://perma.cc/X5NH-6NEX].

73 See AM. IMMIGR. LAWS. ASS’N, *Documents Relating to Flores v. Reno Settlement Agreement on Minors in Immigration Custody* (Jan. 30, 2025), <https://www.aila.org/flores-v-reno-settlement-agreement> [https://perma.cc/B7H8-PQ8K].

74 See *Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015); CONG. RSCH. SERV., R45266, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy* 5–6 (2021).

75 See CONG. RSCH. SERV., *supra* note 74, at 2.

76 See UNITED STATES SENT’G COMM’N, *Quick Facts: Illegal Reentry Offenses* (May 2025), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY24.pdf [https://perma.cc/5KCA-U2LZ] (noting that in FY 2024 the average sentence for all illegal re-entry offenders was 12 months and 95.7 percent of offenders were sentenced to prison).

77 See CONG. RSCH. SERV., *supra* note 74, at 8–9.

In 2017, the first Trump administration's infamous family separation policy seized upon and exacerbated this decades-long practice, systematically separating children from their parents at the United States' southern border.⁷⁸ The policy dramatically expanded in 2018 as part of a zero-tolerance policy, cracking down on violators of Sections 1325 and 1326 by prosecuting *all* noncitizens apprehended between ports of entry.⁷⁹ The zero-tolerance policy made no exceptions.⁸⁰ By the end of the first Trump administration, at least 5,569 children had been separated from their parents.⁸¹ The administration's cruelty was broadly condemned, domestically and internationally.⁸²

On December 11, 2023, the U.S. District Court for the Southern District of California approved a class action settlement agreement in *Ms. L. v. ICE*, a suit originally filed in 2018 that sought injunctive relief relating to the separation of children and parents along the southwest border.⁸³ Under the approved settlement agreement, new standards were created to limit family separation

...as of April 16, 2024, only 3,225 of 4,656 separated children had been reunited with their families.

moving forward and to facilitate the reunification of families that had been separated.⁸⁴ However, as of April 16, 2024, only 3,225 of 4,656 separated children had been reunited with their families.⁸⁵ Further, while helpful in many respects, the settlement agreement

does not apply to adults apprehended in the interior of the U.S. and contains other exceptions that have been leveraged by the Trump administration to ramp up family separations once again.⁸⁶

As a party to the International Covenant on Civil and Political Rights, the United States is obligated under international law not to interfere with family unity, regardless of an individual's citizenship status.⁸⁷ By detaining and separating individuals accused of unlawful entry or re-entry from their families, Sections 1325 and 1326 effectively deprive individuals of this internationally

⁷⁸ See generally Caitlin Dickerson, *An American Catastrophe*, THE ATLANTIC (Aug. 7, 2022), <https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/> [https://perma.cc/PH9T-47XZ].

⁷⁹ See CONG. RSCH. SERV., *supra* note 74, at 8–9.

⁸⁰ *Id.* (noting that prior to the zero-tolerance policy, exceptions were made for individuals with extenuating circumstances, such as asylum seekers, families with young children, or those with significant humanitarian considerations).

⁸¹ See WOMEN'S REFUGEE COMM., *Family Separation in Their Own Words: How Ending Legal Services Is Another Step Toward Separating Families Again* (Apr. 2025), <https://www.womensrefugeecommission.org/wp-content/uploads/2025/04/UTF-8Family-separation-legal-services.pdf> [https://perma.cc/29UC-XAH5].

⁸² E.g., *UN rights chief slams 'unconscionable' US border policy of separating migrant children from parents*, UN NEWS (Jun. 18, 2018), <https://news.un.org/en/story/2018/06/1012382> [https://perma.cc/4WEM-3TZ5].

⁸³ See Settlement Agreement, *Ms. L. v. ICE*, No. 18-cv-00428 (S.D. Cal. Dec. 1, 2023) [hereinafter Settlement Agreement], <https://www.together.gov/assets/docs/Ms.%20L.%20v.%20ICE%20Settlement.pdf> [https://perma.cc/LM7R-ZKNQ]; see also TOGETHER.GOV, *Ms. L v. ICE Settlement*, <https://www.together.gov/mslvice> [https://perma.cc/X7L6-9CRP] (last visited Dec. 2, 2025); AM. C.L. UNION, *Ms. L v. ICE* (Dec. 1, 2023), <https://www.aclu.org/cases/ms-l-v-ice> [https://perma.cc/7ZCW-MBJ7].

⁸⁴ See Settlement Agreement, *supra* note 83, at 26–38; Press release, NAT'L IMMIGR. PROJECT, *Families Separated Under Zero-Tolerance Policy Finally Receive Answers on How Their Cases Will Proceed* (Oct. 16, 2023), <https://ninpnl.org/news/press-releases/families-separated-under-zero-tolerance-policy-finally-receive-answers-how> [https://perma.cc/RBW4-RJ7K]. See also Press Release, NAT'L IMMIGR. PROJECT, *National Immigration Project Condemns Biden Admin's Newest Efforts to Criminalize Migration* (May 31, 2024), <https://ninpnl.org/news/press-releases/national-immigration-project-condemns-biden-administrations-newest-efforts> [https://perma.cc/7A96-LXQY].

⁸⁵ See DEP'T OF HOMELAND SEC., *Family Reunification Task Force*, <https://www.dhs.gov/family-reunification-task-force> [https://perma.cc/9C4G-L6TH] (last updated Jan. 28, 2025); *id.* at 7.

⁸⁶ See Settlement Agreement, *supra* note 83, at 26–38; Mica Rosenberg, Mario Ariza, et al., *ICE Sent 600 Immigrant Kids to Detention in Federal Shelters This Year. It's a New Record*, PROPUBLICA (Nov. 24, 2025), <https://www.propublica.org/article/ice-detentions-immigrant-kids-family-separations>; Trump's DOJ may have begun to test the limits of their ability to prosecute parents for unlawful entry who crossed the border years ago and are now residing in the interior of the United States, even those with lawful status, see Mike Murrillo, *Venezuelan couple living in DC under protected status arrested by officials*, WTOP NEWS (Mar. 14, 2025), <https://wtop.com/dc/2025/03/venezuelan-couple-living-in-dc-under-temporary-protected-status-is-detained-by-ice/> [https://perma.cc/T37R-WTE7].

⁸⁷ International Covenant on Civil and Political Rights [hereinafter ICCPR] art. 17, Dec. 16, 1966, 999 U.N.T.S. 172 (“[n]o person shall be subjected to arbitrary or unlawful interference with his privacy, family home, or correspondence.”). The UN Human Rights Committee, which monitors international compliance with the ICCPR, has stated that “despite a state’s power to regulate entry or residence, non citizens may still enjoy the protection of the Covenant, particularly when considerations of respect for family life may arise.” U.N. Hum. Rights Comm., General Comment No. 15, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

recognized right. Despite this, Trump administration officials have indicated that they would not let family separation concerns impede mass deportations. In a 2024 *60 Minutes* interview, Tom Homan, who is the “Border Czar” in the Trump administration, was asked, “Is there any way to carry out mass deportations without separating families?” He responded: “Of course there is. Families can be deported together.”⁸⁸

Limitations on Future Immigration Relief

Migrants convicted under Sections 1325 and 1326 face additional challenges beyond incarceration, as the conviction itself may “impede current and future attempts to migrate lawfully or obtain asylum.”⁸⁹ Convictions under Sections 1325 and 1326 can implicate some of the criminal grounds for removal.⁹⁰ In some instances, a violation of Sections 1325 or 1326 may constitute an aggravated felony, which generally precludes individuals from obtaining many forms of relief and immigration benefits.⁹¹ In particular, aggravated felony convictions can bar individuals from cancellation of removal, asylum, certain waivers of inadmissibility, voluntary departure, and can make migrants permanently inadmissible.⁹² Further, some plea agreements in the context of Section 1325 and 1326 prosecutions contain so-called “immigration waivers,” which require the defendant to forego claims of asylum or similar relief from removal.⁹³ Additionally, individuals previously convicted of an entry-related offense are often prioritized for future criminal prosecution or deportation.⁹⁴

Privatization and Profit Motive

Prosecutions under Sections 1325 and 1326 both enable and are reinforced by the privatization of immigration detention and criminal incarceration in the United States. The largest private prison and detention companies in the United States, including GEO Group and CoreCivic, have

88 Cecilia Vega, *Trump’s Mass Deportation Plan for Undocumented Immigrants Could Cost Billions a Year*, CBS NEWS (Oct. 27, 2024), <https://www.cbsnews.com/amp/news/trump-mass-deportation-plan-cost-consequences-60-minutes-transcript> [https://perma.cc/NJ22-6UZ8].

89 Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, WARREN INST. (Jan. 2020), https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf [https://perma.cc/3CK8-MN52].

90 See generally 8 U.S.C. §§ 1227(a)(2), 1182(a)(2) (enumerating criminal offenses or admissions for conduct constituting grounds for deportation and inadmissibility). See AM. IMMIGR. COUNCIL, *Aggravated Felonies: An Overview* (2021), <https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview> [https://perma.cc/6D79-2HLA].

91 For instance, violation of section 1325(a) (improper entry) or section 1326 (re-entry) committed by a noncitizen who was previously deported for committing an aggravated felony constitutes an aggravated felony itself. 8 U.S.C. § 1101(a)(43)(O).

92 See AM. IMMIGR. COUNCIL, *supra* note 90.

93 See AM. IMMIGR. COUNCIL, *supra* note 71; HUM. RTS. FIRST, *Punishing Refugees and Migrants The Trump Administration’s Misuse of Criminal Prosecutions* 19–20 (Jun. 2018), <https://humanrightsfirst.org/wp-content/uploads/2022/10/2018-Report-Punishing-Refugees-Migrants.pdf> [https://perma.cc/RQ3W-X5BA] (observing some plea agreements contain immigration waivers that compel individuals to relinquish their asylum or protection claims). *E.g.*, *United States v. Brito*, 1:23-cr-00575 (S.D.N.Y. Feb. 23, 2024) (“The defendant has waived the opportunity to pursue any and all forms of relief and protection from removal.”). Prior to the first Trump administration, federal prosecutors occasionally included waivers of immigration relief for many years, at least since the inception of “Fast-Track” sentencing agreements for noncitizens in the country unlawfully in the 1990s. See Donna Lee Elm, et al., *Immigration Defense Waivers in Federal Criminal Plea Agreements*, 69 MERCER L. REV. 839, 844 (2018). The Trump administration continued this practice to achieve its larger goal of expanding and accelerating the removal of noncitizens. *Id.* at 842. Some advocates and scholars contend that immigration waivers are unenforceable as a noncitizen has a right to a hearing despite the waiver, the criminal defense attorney who advised signing the plea agreement likely provided ineffective assistance of counsel, and the waiver violates public policy and international law obligations. See *id.* at 871. Under the Biden administration, the Department of Justice did not provide explicit guidance concerning the use of immigration waivers in criminal plea agreements. The use of such waivers would likely fall within the policy of individual United States Attorney’s offices (USAO), as the DOJ’s Justice Manual requires each USAO to promulgate written guidance regarding the standard required elements in its plea agreements, including waiver of the defendants’ rights. See U.S. DEP’T JUST., *Justice Manual* 9-27.400 (June 2023). As of 2018, at least fifteen federal districts have included immigration waiver language in plea agreements. Elm, et al., *supra*, at 892–900.

94 AM. IMMIGR. COUNCIL, *supra* note 71.

benefitted from federal government contracts worth billions over the past two decades.⁹⁵ This direct and substantial financial benefit creates a powerful incentive for corporations to support prosecutions under Sections 1325 and 1326, which result in more noncitizens held in privately owned facilities.⁹⁶ Various factors further cement this symbiotic relationship, including political contributions by large private prison corporations that favor enforcement-only policies and thus maintain private prison profit, and a revolving door of employees from government to industry.⁹⁷

Political contributions by private prison corporations and their employees help drive harmful prosecutions under Sections 1325 and 1326.⁹⁸ When legislators are financially incentivized by private prison companies to support pro-industry policy and, therefore, robust border enforcement, it ensures that a steady stream of noncitizens is sent to private facilities.⁹⁹ This maintains a harmful cycle of prosecutions, confinement, and resulting corporate profits, which fuel an appetite for even more prosecutions.¹⁰⁰

Prosecutions under Sections 1325 and 1326 are further enabled by the revolving door of employees moving from government immigration agencies to leadership positions in private prison corporations.¹⁰¹ The possibility of future private sector employment creates incentives for government officials to embrace industry-friendly policies, including robust prosecutions and enforcement that fill private prison beds.¹⁰² Special legislative and contractual earmarks for private industry, including a requirement that ICE pay for a minimum number of private detention beds, epitomize the preferential treatment that private industry receives.¹⁰³ Even when the federal government has taken action to lessen reliance on private contractors, close ties between contractors and government officials circumvent well-intentioned policies.¹⁰⁴

In examining the role of private actors in this context, both immigration detention centers and private prisons are relevant. Although prosecutions under Sections 1325 and 1326 are federal criminal cases, migrants may also be detained in an immigration detention center before being referred for prosecution¹⁰⁵ or after they have served their sentence and are facing a likely deportation.¹⁰⁶ Even if an adult migrant charged under these statutes is not placed in civil immigration detention, if parents attempt to cross the border with their children and are subject

95 Eunice Hyunhye Cho, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years Into the Biden Administration*, AM. C.L. UNION (Aug. 7, 2023), <https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration> [https://perma.cc/4SYB-5LHV]. In 2022, GEO Group made \$1.05 billion in revenue from ICE contracts, while CoreCivic made \$552.2 million from ICE detention contracts.

96 *Id.*

97 See Khadija Alam, *Private Prison Giant GEO Group Ramps up Lobbying on Immigrant Surveillance*, OPENSECRETS (July 25, 2024), <https://www.opensecrets.org/news/2024/07/private-prison-giant-geo-group-ramps-up-lobbying-on-immigrant-surveillance/> [https://perma.cc/W555-XZ7W].

98 *Infra* Sec. III.B.

99 *Infra* Sec. III.B.4.

100 See, e.g., DET. WATCH NETWORK & CTR. FOR CONST. RTS., *Banking on Detention: Local Lockup Quotas & The Immigrant Dragnet 6* (2015), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf> [https://perma.cc/8BYX-BR5U].

101 *Infra* Sec. III.B.3

102 *Infra* Sec. III.B.4

103 D'ANIS & GROVES, *supra* note 18.

104 See Exec. Order No. 14,006, 86 Fed. Reg. 7483 (Jan 26, 2021); see also Lauren-Brooke Eisen, *Breaking Down Biden's Order to Eliminate DOJ Private Prison Contracts*, BRENNAN CTR. (Aug. 27, 2021), <https://www.brennancenter.org/our-work/research-reports/breaking-down-bidens-order-eliminate-doj-private-prison-contracts> [https://perma.cc/R5F5-PBK6].

105 See URBAN WIRE, *What Do We Know About Section 1325* (Aug. 19, 2019), <https://www.urban.org/urban-wire/what-do-we-know-about-section-1325> [https://perma.cc/QX6J-BH2E] (explaining that after an arrest by DHS, CBP, or Border Patrol agents, "officers may then administratively process those in their custody for removal proceedings").

106 See Bryan Lonegan, *IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES*, IMMIGRATION LAW UNIT OF THE LEGAL AID SOCIETY (Feb. 2006), https://www.nilc.org/wp-content/uploads/2015/12/detentionremovalguide_2006-02.pdf [https://perma.cc/56YS-5N63].

to criminal prosecution, their children may be separated and placed in the custody of the federal government, sometimes in private detention facilities for children.¹⁰⁷ Therefore, examining the role that private actors play in both immigration detention centers and federal prisons is critical to a complete understanding of Sections 1325 and 1326.

The Outsized Role of Private Detention and Prisons

Presently, private actors play an outsized role in both immigration detention and criminal incarceration. At its inception in the late nineteenth century, civil immigration detention was relatively brief and was utilized, albeit in racist and classist manners, largely for the purpose of determining whether individuals were legally admissible to enter the United States.¹⁰⁸ Today, the practice of civil immigrant detention has exploded into a familiar facet of the modern immigration system, to the benefit of private entities.¹⁰⁹

Today, the practice of civil immigrant detention has exploded into a familiar facet of the modern immigration system, to the benefit of private entities.

The profit motive inherent in privatization creates an incentive to detain, charge, convict, and incarcerate noncitizens under Sections 1325 and 1326. This connection was articulated in the following quote from the 2010 Annual Report of CoreCivic (then Corrections Corporation of America), a dominant player in this space:

Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities. This possible growth depends on a number of factors we cannot control, including crime rates and sentencing patterns in various jurisdictions and acceptance of privatization. The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws.¹¹⁰

Spurred by this profit motive, private immigration detention has grown steadily since 2009, largely due to Congressional intervention mandating detention bed minimums.¹¹¹ In 2009, 49

¹⁰⁷ URBAN WIRE, *supra* note 105 (explaining that when parents are criminally charged, their children will be held in civil detention centers while the adults are held in federal prison facilities). *E.g.*, Kate Morrissey, *Family separations at the border continue under Biden*, THE SAN DIEGO UNION-TRIB. (Aug. 16, 2022), <https://www.sandiegouniontribune.com/news/immigration/story/2022-08-16/family-separations-at-the-border-continue-under-biden> [<https://perma.cc/KVW7-SQ3D>]. The settlement in *Ms. L v. ICE* provides that children will not be separated from their families in detention centers except in limited circumstances. See Settlement Agreement, *supra* note 83, at 27. Further the settlement expressly excludes Section 1325 prosecutions from these ‘limited exceptions.’ *Id.* However, the Second Trump administration has gutted payments to services meant to help reunite the numerous families, leaving these families separated throughout detention centers. See Mark Betancourt & Ailsa Chang, *ACLU Says Trump Is Breaching Family Separation Settlement*, NPR (Oct. 27, 2025), <https://www.npr.org/2025/10/27/nx-s1-5584004/aclu-says-trump-administration-is-breaching-family-separation-settlement> [<https://perma.cc/4T9G-D9L3>].

¹⁰⁸ Korthius, *supra* note 42.

¹⁰⁹ See Melina Juárez, et al., *Twenty Years After IIRIRA: The Rise of Immigrant Detention and Its Effects on Latinx Communities Across the Nation*, 6 J. MIGRATION AND HUM. SEC. 74, 84 (2018) (observing the early twenty-first century rise of immigrant detention as attributable to increases in the federal immigration enforcement budget and passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); see also NAT’L IMMIGR. PROJECT OF THE NAT’L LAWYRS. GUILD, THE BIDEN ADMINISTRATION’S TRACK RECORD ON ENFORCEMENT, DETENTION, AND THE CRIMINALIZATION OF IMMIGRANTS OF COLOR (May 2023), https://nlpnl.org/sites/default/files/2023-05/2023_May-Biden-Report-Card.pdf [<https://perma.cc/ZUY6-R67V>].

¹¹⁰ U.S. SEC. & EXCH. COMM’N, FORM 10-K, CORRECTIONS CORPORATION OF AMERICA 21 (Dec. 31, 2005) <https://www.sec.gov/Archives/edgar/data/1070985/000095014406001892/g99938e10vk.htm> [<https://perma.cc/P7AG-8YJU>].

¹¹¹ THE FLAW, *supra* note 8; DET. WATCH NETWORK, *supra* note 8.

percent of immigrant detention beds were in private facilities;¹¹² by 2015, that figure rose to 62 percent.¹¹³ During the first Trump administration, immigration detention rose sharply.¹¹⁴ In January of 2020, 81 percent of people detained *each day* were held in facilities owned or operated by private corporations.¹¹⁵ This number remained essentially unchanged during the first two years of the Biden administration, but steadily increased throughout the administration and into the second Trump administration.¹¹⁶ As of early 2025, a staggering 86 percent of people detained in ICE custody each day were held in detention facilities that were privately owned or operated.¹¹⁷ The proportion of individuals in private detention is likely to grow as budget allocations at the start of the second Trump administration provide extensive resources for expanded private detention.¹¹⁸ These allocations include a \$45 billion allocation in the One Big Beautiful Bill Act set aside for ICE to pay private detention contractors; this earmark caused the stocks of major private prison companies to increase between 50 percent and 70 percent.¹¹⁹

The privatization of prisons saw an uptick even before similar rates increased in the immigration detention context.¹²⁰ Beginning in 2000, the federal prison system's turn to privatization grew dramatically: The number of federal prisoners held in private prisons rose 120 percent from 15,524 in 2000 to 34,159 in 2016, far outpacing the growth in the overall prison population.¹²¹ Although the number of federal prisoners in private prisons declined between 2012 and 2024, in 2021, 9 percent of the total state and federal prison population was housed in private prisons.¹²²

The Biggest Corporate Players and Their Relationships with the Federal Government

Lay of the Land

The same corporate players dominate both the private prison world and private immigration detention. GEO Group and CoreCivic are two of the largest private prison and detention companies in the United States.¹²³ In 2024, GEO Group's total revenue was \$2.42 billion.¹²⁴ \$997

112 Caitlin Patler & Tanya Maria Golash-Boza, *The Fiscal and Human Costs of Immigrant Detention and Deportation in the United States*, 19 SOCIO. COMPASS 1, 2 (2017), https://globalmigration.ucdavis.edu/sites/g/files/dgvnsk821/files/2017-10/Patler_et_al-2017-Sociology_Compass.pdf [https://perma.cc/7MUN-8CF8].

113 *Id.*

114 Caitlin Dickerson, *Immigration Arrests Rise Sharply as a Trump Mandate Is Carried Out*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/immigration-enforcement-ice-arrests.html> [https://perma.cc/9THK-XAYC].

115 *Id.*

116 See Cho, *supra* note 95.

117 See Muzaffar Chishti & Valerie Lacarte, *U.S. Immigrant Detention Grows to Record Heights under Trump Administration*, MIGRATION POL'Y INST.: POL'Y BEAT, (Oct. 29, 2025), <https://www.migrationpolicy.org/article/trump-immigrant-detention> [https://perma.cc/7TEV-TUZ3].

118 See Katherine Culliton-Gonzalez & Lama Elsharif, *Trump's Budget Bill Benefits Private Immigration Detention Companies that Donated to Trump*, CREW (Jul. 23, 2025), <https://www.citizensforethics.org/reports-investigations/crew-investigations/trumps-budget-bill-benefits-private-immigration-detention-companies-that-donated-to-trump/> [https://perma.cc/J6A3-2CDW]; Pub. Law 119-21, 139 Stat. 358 § 90003.

119 *Id.*

120 See generally SILKY SHAH, UNBUILD WALLS: WHY IMMIGRANT JUSTICE NEEDS ABOLITION (Haymarket Books 2024).

121 KARA GOTSCH & VINAY BASTI, THE SENTENCING PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISON 9 (2018), <https://www.sentencingproject.org/app/uploads/2022/08/Capitalizing-on-Mass-Incarceration.pdf> [https://perma.cc/U9RA-KUL7].

122 KRISTEN M. BUDD, THE SENTENCING PROJECT, PRIVATE PRISONS IN THE UNITED STATES (Feb. 21, 2024), <https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/> [https://perma.cc/REA4-5CBW].

123 See Kate Duguid, *U.S. Private Prison Revenue Under Pressure from New Biden Rules*, REUTERS (Jan. 27, 2021), <https://www.reuters.com/article/us-usa-companies-biden-prisons/u-s-private-prison-revenue-under-pressure-from-new-biden-rules-idUSKBN29W14Z> [https://perma.cc/J9TN-URBV].

124 GEO GROUP INC., ANNUAL REPORT TO INVESTORS 18 (2024), <https://investors.geogroup.com/static-files/0e302371-9812-435b-8560-bfe62d4949da> [https://perma.cc/S7N2-DL4V].

million of this 2024 revenue, or about 41 percent, came from contracts with ICE.¹²⁵ In 2024, the U.S. Marshals and Federal Bureau of Prisons accounted for 17 percent of GEO Group's total revenue, or about \$413 million.¹²⁶ In addition, in 2024, the U.S. Marshals and ICE accounted for 21 percent (\$411.6 million) and 29 percent (\$568.4 million), respectively, of CoreCivic's total revenue.¹²⁷ Other significant players in the private prison industry include STG International, Classic Air Charter, and B.I. Incorporated,¹²⁸ all of which have lucrative contracts with ICE.¹²⁹

Political Contributions

Steady bottom-line growth provides these sizeable corporate players with a clear profit motive to open as many facilities and fill as many beds as possible, while facilitating continued government support through substantial campaign contributions to politicians who shape immigration law. In 2024, GEO Group expended \$1.4 million on lobbying Congress and the Department of Homeland Security, advocating for continued federal use of contracted correctional facilities and surveillance technologies, among other issues.¹³⁰ In 2022, CoreCivic contributed \$524,550 to federal, state, and local candidates, parties, and committees, and spent \$2.2 million in direct lobbying.¹³¹ These contributions tend to funnel financial resources to Republican politicians at the federal level who advocate for increased border security and the expansion of interior immigration enforcement.¹³²

This pattern of sizeable contributions and lobbying is not ancillary to the political project of the private prison industry. In 2023, GEO Group touted that its "political and lobbying activities focus on promoting the benefits of public-private partnerships" and included support of eight pieces of legislation.¹³³ As of November 17, 2024, GEO Group's PAC and affiliated individuals had contributed more than \$3.2 million towards Republican candidates and affiliated organizations in the 2024

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See also U.S. SEC. EXCH. COMM'N, FORM 10-K CORECIVIC, INC. (Dec. 31, 2024), <https://ir.corecivic.com/static-files/0e4bbc4e-b885-4f3f-a957-6c1f071bfb17> [https://perma.cc/8YLT-F7LN].

¹²⁸ B.I. Incorporated represents an extension of GEO Group's enmeshment into the private security landscape, serving as GEO Group's subsidiary providing remote monitoring services. See GEO GROUP, *Electronic Monitoring*, <https://www.geogroup.com/geo-care/electronic-monitoring/> [https://perma.cc/G9DN-S8QU] (last visited Nov. 10, 2025).

¹²⁹ FREEDOM FOR IMMIGRANTS, *Mapping U.S. Immigration Detention*, <https://www.freedomforimmigrants.org/map> (showing up to date data on the largest private immigration detention corporations currently contracting with ICE) (last visited Jan. 10, 2025); see also Lauren-Brooke Eisen, *Private Prison Companies' Enormous Windfall: Who Stands to Gain as ICE Expands*, BRENNAN CTR. FOR JUST. (Oct. 1, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/private-prison-companies-enormous-windfall-who-stands-gain-ice-expands> [https://perma.cc/S27N-8EAA] (highlighting the biggest beneficiaries from ICE's 2025 financial expansion).

¹³⁰ See OPENSECRETS, *Client Profile: GEO Group*, <https://www.opensecrets.org/federal-lobbying/clients/lobbyists?cycle=2024&id=D000022003> [https://perma.cc/3VM8-H6NC] (last visited Nov. 10, 2025).

¹³¹ CORECIVIC, *POLITICAL ACTIVITY AND LOBBYING REPORT 2022* 3, 6 (Jun. 2023), <https://ir.corecivic.com/corporate-governance/political-lobbying-activity> [https://perma.cc/EL2E-57MV].

¹³² Dario McCarty, *Private Prison Industry Shifts Focus to Immigrant Detention Centers, Funding Immigration Hawks*, OPENSECRETS (Jun. 21, 2022), <https://www.opensecrets.org/news/2022/06/private-prison-industry-shifts-focus-to-immigrant-detention-centers-funding-immigration-hawks/> [https://perma.cc/U5CP-RXEZ].

¹³³ GEO GROUP INC., *POLITICAL ACTIVITY AND LOBBYING REPORT (2023)*, https://www.geogroup.com/media/t3ipi5yy/geo_political_activity_and_lobbying_report_2023.pdf [https://perma.cc/PY2S-TFY4]. In 2023, GEO Group's PAC largely targeted its lobbying efforts to appropriations bills for DHS and the Department of Defense, as well as H.R. 2, the "Secure the Border Act," a bill introduced by House Republicans that would have restarted border wall construction, severely restricted the right to seek asylum, and established new criminal penalties on migrants. *Id.*; see also OPENSECRETS, *GEO Group: Bills Lobbied*, <https://www.opensecrets.org/orgs/geo-group/lobbying?id=D000022003> [https://perma.cc/RL6T-EVVS] (last visited Nov. 10, 2025); Alexandra Villareal, *Bill Analysis: The Secure the Border Act of 2023*, NAT'L IMMIGR. F. (May 8, 2023), <https://immigrationforum.org/article/bill-analysis-the-secure-the-border-act-of-2023> [https://perma.cc/S2VF-PLKJ].

election cycle, including a one-million-dollar contribution to the Make America Great Again PAC.¹³⁴ Likewise, CoreCivic's lobbying arm advocated in 2021 for "[i]ssues pertaining to provisions related to government use of private corrections facilities," in the context of federal appropriations to DHS and the BOP.¹³⁵ Following the 2024 election, GEO Group's stock jumped more than 80 percent.¹³⁶

In short, GEO Group and CoreCivic have spent significant funds to support stricter immigration enforcement as well as immigration laws that result in increased detention of noncitizens.¹³⁷ As noted above, robust enforcement at the border, including consistent prosecutions under Sections 1325 and 1326, ensures a steady stream of noncitizens to fill private facilities, which keeps corporate profits strong and, in turn, enables them to continue lobbying and influencing legislators.

The Revolving Door

The ironclad relationship between private prisons and detention companies and government agencies like ICE and BOP is further solidified by a revolving door of employees, typically moving from government positions to the private sector.

The ironclad relationship between private prisons and detention companies and government agencies like ICE and BOP is further solidified by a revolving door of employees, typically moving from government positions to the private sector.¹³⁸ For example, former GEO Group Senior Vice President David Venturella was initially the director of Enforcement and Removal Operations for ICE before being hired as a full-time advisor to DHS on the very

same contracts awarded to the GEO Group.¹³⁹

In fact, according to a letter sent in 2020 by Senator Elizabeth Warren and other legislators to the then directors of ICE and the BOP, "a number of key officials have left ICE and BOP to work for private prison and immigration detention companies—with several of these officials in positions where they work with or solicit business from their former colleagues."¹⁴⁰ These officials include: Scott Sutterfield, ICE's Acting Director for the New Orleans field office, who left to work for LaSalle (a private prison company); Tracey Valerio, an ICE official in charge of contracting who left and later worked as a paid witness for GEO in a lawsuit alleging GEO violated minimum wage

¹³⁴ OPENSECRETS, *GEO Group*, <https://www.opensecrets.org/orgs/geo-group/summary?toprecipcycle=2024&contribcycle=2024&lobcycle=2024&outspendcycle=2022&id=D000022003&topnumcycle=2024> [https://perma.cc/SM2A-PJF6] (last visited Dec. 2, 2025). In the 2022 election cycle, GEO Group's PAC and individuals associated with the Corporation donated more than \$1,500,000 to Congressional candidates (almost exclusively Republicans) and outside groups associated with Republican election campaigns. *Id.*

¹³⁵ K. LAURIE MCKAY, CORECIVIC LOBBYING REPORT, GREENBERG TRAURIG, LLP (2021) <https://lda.senate.gov/filings/public/filing/70e80c46-e2b1-4285-b7df-7ba656b9d18e/print/> [https://perma.cc/BK5G-YUAN].

¹³⁶ See Peter Charalambous & Laura Romero, *Private Prison Firms Contributed More than \$1M to Trump's Reelection. Now They Expect a Business Boom*, ABC NEWS (Nov. 20, 2024), <https://abcnews.go.com/US/private-prison-firms-contributed-1m-trumps-reelection-now/story?id=116046776> [https://perma.cc/7UP7-P23X].

¹³⁷ Cho, *supra* note 95.

¹³⁸ OPENSECRETS, *supra* note 130 (showing that, in 2024 10 out of 13 GEO Group lobbyists used to hold government positions).

¹³⁹ Jerry Ianelli, *ICE is Getting Legal Advice From South Florida's Private-Prison Giant, Emails Show*, MIAMI NEW TIMES (Dec. 10, 2018), <https://www.miaminewtimes.com/news/geo-group-coordinated-on-ices-california-lawsuit-emails-show-10945740> [https://perma.cc/7SA3-67Y5]. Additionally, in 2023, all but one of GEO Group's registered lobbyists were identified as "revolvers," meaning former government regulators, congressional staff or other government officials. See OPENSECRETS, *supra* note 130; see also Douglas MacMillan & Aaron Schaffer, *The Former Private Prison Exec Behind ICE's Immigrant Detention Surge*, WASH. POST (Aug. 1, 2025) <https://www.washingtonpost.com/business/2025/08/01/ice-david-venturella-geo-immigration-detention/> [https://perma.cc/Z4SM-JEPY] (explaining the hiring process and the position selected as a mean of circumventing ethics rules).

¹⁴⁰ Elizabeth Warren, Letter from Elizabeth Warren, Sen., and other members of Congress, to Matthew Albence, Acting Director U.S. Immigr. and Customs Enforcement and Kathleen Hawk Sawyer, Director, Fed. Bureau of Prisons (Jan. 16, 2020), <https://www.warren.senate.gov/imo/media/doc/2020.01.16%20Letter%20to%20ICE%20and%20BOP%20raising%20concerns%20about%20revolving%20door%20ethics%20violations.pdf> [https://perma.cc/M2WE-ZB6A].

laws; Frank Lara, BOP's Assistant Director, who left to become GEO's director of operations; and Daniel Ragsdale, the Acting Head of ICE who left to become Executive Vice President for contract compliance at GEO.¹⁴¹

In addition, Lanier Avant, former Chief of Staff for Rep. Bennie Thompson and Staff Director for the House Homeland Security Committee, left to become a lobbyist for Avant, Bishop et al., which has GEO Group as a client.¹⁴² Perhaps the most notable example is the time Attorney General Pam Bondi spent advocating on behalf of GEO Group prior to her appointment to head the Department of Justice.¹⁴³ The revolving door between the federal agencies responsible for detaining noncitizens and the private companies they contract with not only conveys that their futures are inextricably tied to one another, but also invites opportunities for corruption.

Corporate-Friendly Quotas and Contract Provisions

As noted above, CoreCivic and GEO Group have spent millions of dollars lobbying Congress over the years. Much of this lobbying has focused on Homeland Security appropriations.¹⁴⁴ These efforts paid off when language was introduced to the DHS Appropriations Act of 2010, mandating that DHS “maintain a level of not less than 33,400 detention beds.”¹⁴⁵ Then, the Consolidated Appropriations Act of 2012 raised this number to 34,000 beds.¹⁴⁶ The detention bed mandate contributed to an enormous surge in the total number of people in immigration detention, nearly doubling from 230,000 people in FY 2005 to 440,600 individuals in FY 2013.¹⁴⁷ As of October 2025, ICE detains nearly 60,000 people on average each day.¹⁴⁸

The meaning of the detention bed directive is disputed within the federal government, with some interpreting it to mean just “maintain” while others believe it imposes an obligation to actually

141 Press Release, Sen. Elizabeth Warren, Warren Leads Colleagues Investigating the Revolving Door Between Federal Agencies and the Private Detention Industry (Jan. 17, 2020), <https://www.warren.senate.gov/oversight/reports/warren-leads-colleagues-investigating-the-revolving-door-between-federal-agencies-and-the-private-detention-industry> [https://perma.cc/N8N2-NTPM].

142 OPEN SECRETS, *Lanier Avant*, <https://www.opensecrets.org/revolving-door/summary?id=83153> [https://perma.cc/W6RP-XLBD] (last visited Dec. 2, 2025); OPEN SECRETS, *Lobbying Firm Profile: Avant, Bishop et al.*, <https://www.opensecrets.org/federal-lobbying/firms/summary?id=F317911> [https://perma.cc/Y5YC-YJGU] (last visited Dec. 2, 2025).

143 See OPEN SECRETS, *Lobbyist Activity, Pam Bondi* (2019), <https://www.opensecrets.org/federal-lobbying/lobbyists/summary?cycle=2019&id=Y0000055471L> [https://perma.cc/R7QM-6DR7] (last visited Dec. 2, 2025). Between the end of her tenure as the Attorney General of Florida and the start of her position as U.S. Attorney General, Bondi represented GEO Group as a registered lobbyist with Ballard Partners. See Statement Opposing the Nomination of Pam Bondi for Attorney General, Hearing Before the S. Comm. on the Judiciary, 119th Cong. (Jan. 2025) (statement of National Immigrant Justice Center), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2025-01/NIJC-statement-opposing-AG-nomination-Pam-Bondi_Jan2025.pdf [https://perma.cc/RHJ6-MFMQ]. In response to concerns raised over her impartiality by members of Congress and advocacy groups, Bondi made clear that she would take all ethical steps needed to avoid a conflict of interest between her role as overseer of federal prosecutions and former lobbyist. *Id.*; Press Release, U.S. Senate Committee on the Judiciary, Pam Bondi's Extensive Lobbying for Wealthy Special Interests and Foreign Government Poses Serious Conflict of Interest (Jan. 15, 2025), <https://www.judiciary.senate.gov/press/dem/releases/pam-bondis-extensive-lobbying-for-wealthy-special-interests-and-foreign-government-poses-serious-conflict-of-interest> [https://perma.cc/L3XZ-D4JT]; Questions for the Record, Questions from Senator Whitehouse, Nomination of Pamela Bondi to be Attorney General of the United States (Jan. 16, 2025), https://www.judiciary.senate.gov/imo/media/doc/2025-01-15_-_qfr_responses_-_bondi.pdf [https://perma.cc/T79P-RUK9]. However, Bondi has yet to recuse herself from proceedings involving GEO Group and issued memoranda directing increased immigration enforcement, which substantially benefits GEO Group. See Letter From Senator Richard Durbin, Ranking Member, U.S. Senate Committee on the Judiciary, to Pamela Bondi, Attorney General for the United States (May 2, 2025), <https://www.judiciary.senate.gov/imo/media/doc/2025-05-02-Letter-to-AG-Bondi-re-GEO.pdf> [https://perma.cc/K3L8-UD8E].

144 CoreCivic and GEO Group spent \$8.7 million and \$1.3 million, respectively, lobbying Congress solely on Homeland Security appropriations between 2006 and 2015. Sharita Gruberg, *How For-Profit Companies Are Driving Immigration Detention Policies*, AM. PROGRESS (Dec 18, 2015), <https://www.americanprogress.org/article/how-for-profit-companies-are-driving-immigration-detention-policies/> [https://perma.cc/X7AF-LP76].

145 *Id.*

146 *Id.*

147 *Id.*

148 See *Immigration Detention Quick Facts*, TRACREPORTS, <https://tracreports.org/immigration/quickfacts/> [https://perma.cc/9WGU-UPEH] (last visited Nov. 10, 2025).

fill the beds.¹⁴⁹ Regardless, ICE has continued to detain close to or over the bed quota each day, depending on the facility.¹⁵⁰ There is an incentive for ICE to detain as many people as they can so that they do not appear to be wasting resources, particularly given prior criticisms from the U.S. Government Accountability Office.¹⁵¹ This financial incentive to detain, however, is reinforced by “tiered pricing” structures, which give ICE a discount on each person detained above the guaranteed minimum.¹⁵² Internal communications from ICE reveal that the agency makes meeting local and facility quotas—guaranteed bed minimums proscribed in ICE contracts to ensure optimal pricing—a priority to realize fiscal benefits related to tiered pricing.¹⁵³ Further, policy initiatives such as Project 2025 have called to double the amount of available bed spaces, all but guaranteeing that the minimum number of bed spaces will increase during the second Trump administration.¹⁵⁴

Not only do corporate-friendly quotas and contract provisions perpetuate the harms of prosecutions under Sections 1325 and 1326, but these agreements also encourage further profit-seeking, often resulting in more harmful detention conditions than those found in non-private facilities. Private facilities exacerbate the lack of oversight and transparency generally found in prison facilities due to increased cost-cutting, indirect contracting, and ambiguous standards.¹⁵⁵ Complaints about private facilities commonly center around inadequate and delayed medical care, mistreatment and abuse perpetrated with impunity, poor food and sanitation quality, language access concerns, and a general lack of accountability for issues at the facilities.¹⁵⁶ Individual anecdotes span a horrifying range, varying anywhere between being told to drink water to treat a myriad of medical conditions, having the only food provided be infested with worms, being assaulted for complaining about said food, and having to submit a request that takes two days to process to receive a bandage for an open burn wound.¹⁵⁷ Companies like CoreCivic and GEO Group have had egregious medical staffing ratios, such as one doctor per 1,500 detainees.¹⁵⁸ A 2016 report from the DOJ found that private prison inmates submitted more than twice as many grievances regarding prison staff and food grievances as compared to the BOP institutions.¹⁵⁹

Further, even when parties take steps to reduce governmental reliance on private contractors for detention, the powerful connections between contractors and the government lead to the

149 See Gruberg, *supra* note 144; NAT’L IMMIGR. JUST. CTR., *Immigration Detention Bed Quota Timeline* (Dec. 2015), https://immigrantjustice.org/sites/default/files/ImmigrationDetentionBedQuotaTimeline_2015_12_09.pdf [<https://perma.cc/P3TB-JE3F>].

150 The daily bed quota funded by Congress is 41,500. AM. IMMIGR. LAWS. ASS’N, *Featured Issue: Immigration Detention and Alternatives to Detention* (Dec. 16, 2024), <https://www.aila.org/library/featured-issue-immigration-detention-and-alternatives-to-detention?limit=100> [<https://perma.cc/B7VB-K4GK>]; TRACREPORTS, *ICE Contractual Capacity and Number Detained: Overcapacity vs. Overcrowding* (Jul. 8, 2025), <https://tracreports.org/reports/762/> [<https://perma.cc/7KY7-NLTB>] (explaining that 45 out of 181 detention facilities exceeded their contractual capacity as of April 13, 2025).

151 ICE’s desire to appear cost-effective can be presumed only to have grown since 2014, when the U.S. Government Accountability Office (GAO) produced a report on immigration detention criticizing ICE for underutilizing cost-efficient bed space. DET. WATCH NETWORK & CTR. FOR CONST. RTS., *BANKING ON DETENTION: LOCAL LOCKUP QUOTAS & THE IMMIGRANT DRAGNET* 6 (2015), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf> [<https://perma.cc/4WA2-8S72>].

152 *Id.*

153 See *id.*

154 See DANS & GROVES, *supra* note 18; Pub. Law 119-21 § 70101 (appropriating \$45 million solely for increased “adult alien detention”).

155 Mary Small, *A Toxic Relationship: Private Prisons and U.S. Immigration Detention*, DET. WATCH NETWORK 3 (Dec. 2016), https://www.detentionwatchnetwork.org/sites/default/files/reports/A%20Toxic%20Relationship_DWN.pdf [<https://perma.cc/ST7T-AMT9>].

156 See *id.*

157 See *id.* at 3–4; Press Release, NAT’L IMMIGR. PROJECT, *New Reports of Rotten Food with Worms at Farmville Detention Center* (Oct. 21, 2025), <https://nipnl.org/news/press-releases/new-reports-rotten-food-worms-farmville-detention-center> [<https://perma.cc/3GQQ-3JEC>].

158 See *id.* at 6; DET. WATCH NETWORK & NAT’L IMMIGR. JUST. CTR., *Lives in Peril: How Ineffective Inspections Make ICE Complicit in Immigration Detention Abuse* 25–26 (Oct. 2015), <https://immigrantjustice.org/lives-peril-how-ineffective-inspections-make-ice-complicit-detention-center-abuse> [<https://perma.cc/UP7B-4BNF>].

159 See OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons* 23 (Aug. 2016), <https://www.documentcloud.org/documents/3536861-Bop-Oig-Report-e1606/> [<https://perma.cc/5V72-KX7R>].

circumvention of those efforts. As an example, when President Biden issued an Executive Order in 2021 to end the use of private detention facilities for those in federal criminal custody,¹⁶⁰ federal agencies and for-profit entities found creative workarounds.¹⁶¹ Despite language that stated that the Attorney General “shall not renew Department of Justice contracts with privately operated criminal detention facilities, as consistent with applicable law,” for-profit companies used intergovernmental service agreements to effectively circumvent the order, non-DOJ government entities extended contracts, and former President Biden himself made exceptions to his Executive Order due to political pressure.¹⁶²

Overall, prosecutions under Sections 1325 and 1326 enable and are reinforced by the privatization of immigration detention and criminal incarceration. Private corporations in this space are inherently interested in the maintenance of these provisions because more people detained in their facilities necessarily results in greater profits. Extensive lobbying efforts, campaign spending, and the revolving door of individuals shifting from the public to the private sector have resulted in a type of agency capture that creates a feedback loop between amassed capital and increasing numbers of incarcerated migrants.

MASS SURVEILLANCE AND SECTIONS 1325 AND 1326

In addition to entrenching the privatized detention of noncitizens, the criminalization of unauthorized border crossings through Sections 1325 and 1326 plays a crucial role in enabling and expanding mass surveillance practices. By classifying irregular entry as a criminal offense, these provisions provide the government with a justification to impose extensive surveillance measures, ostensibly to identify and prosecute violations of the law. Ultimately, however, they contribute to an environment where the privacy and freedoms of both noncitizens and citizens alike are compromised.

Private companies play a central role in developing and supplying the surveillance technologies used by the government. Just as in the detention context, this public-private relationship capitalizes on Sections 1325 and 1326, making the enforcement of immigration laws a profitable market for corporate actors. The companies’ pursuit of profit, in turn, reinforces the reliance on mass surveillance, as industry constantly develops and sells new technologies to strengthen the government’s monitoring

Private companies play a central role in developing and supplying the surveillance technologies used by the government.

¹⁶⁰ Exec. Order No. 14,006, 86 Fed. Reg. 7483 (Jan 26, 2021); Memorandum from Sally Yates, Deputy Att’y Gen. U.S. Dep’t of Justice to Acting Dir. Fed. Bureau of Prisons (Aug. 18, 2016), <https://www.justice.gov/opa/file/886311/dl> [<https://perma.cc/R4QH-9UV7>].

¹⁶¹ DET. WATCH NETWORK AND PROJECT SOUTH, *Broken Promises: Limits of Biden’s Executive Order on Private Prisons and Immigration Detention Expansion* (2021), https://www.detentionwatchnetwork.org/sites/default/files/reports/Broken%20Promises_DWN%20and%20Project%20South.pdf [<https://perma.cc/MP4G-PXW6>]; Press Release, NAT’L IMMIGR. PROJECT, Families Separated Under Zero-Tolerance Policy Finally Receive Answers on How Their Cases Will Proceed (Oct. 16, 2023), <https://ninpig.org/news/press-releases/families-separated-under-zero-tolerance-policy-finally-receive-answers-how> [<https://perma.cc/P9M4-R3E7>]; Press Release, DET. WATCH NETWORK, 85 Immigrant and Human Rights Groups Call for Investigation & Demand Private Prison Ban Extend to ICE Detention (Feb. 9, 2022), <https://www.detentionwatchnetwork.org/pressroom/releases/2022/85-immigrant-human-rights-groups-call-investigation-demand-private-prison> [<https://perma.cc/XPZ4-XUNZ>].

¹⁶² See Exec. Order No. 14,006, 86 Fed. Reg. 7483 (Jan 26, 2021); Eisen *supra* note 129.

abilities. This creates a cycle where the criminalization of unauthorized entry increases the demand for heightened surveillance, driving the private sector to innovate and expand tools for government use.

As noted above, most 1325 and 1326 prosecutions occur in judicial districts along the Southern border with Mexico.¹⁶³ These judicial districts cover areas where individuals have the fewest Fourth Amendment protections due to the “border exception” and where U.S. Customs and Border Protection (CBP) enjoys enhanced search powers up to 100 miles away from the border.¹⁶⁴ With scant constitutional protection at the border itself, the emphasis on criminalization and enforcement has opened the door for the adoption of invasive technologies that enable constant monitoring and data collection, establishing a surveillance system that extends its influence on the lives of numerous individuals who are even distant from the actual act of border crossing.

The Human Toll of Border Surveillance

For the last five decades, the U.S. government’s border strategy has implemented aggressive technology that endangers migrants. The trend to militarize the border started at the end of the 1970s, when ground sensors used by the American military in Vietnam were repurposed to detect movements at the border.¹⁶⁵ The Clinton administration fashioned the “prevention through deterrence” border strategy, designed to force migrants to take more dangerous routes by blocking popular crossing spots.¹⁶⁶ Despite its attempt to abandon harsh rhetoric from the first Trump administration, the Biden administration also embraced “prevention through deterrence” and made significant investments in new technologies that automate immigration enforcement and surveillance.¹⁶⁷

Today, the Southern border is surveilled around the clock by an intricate mix of physical and digital barriers. Contemporary surveillance at the border includes a mix of approaches, including: Predator B drones that monitor the border from the air; ground sensors buried in the ground that warn border enforcement agents if they detect movement; mobile and stationary surveillance towers that can transmit surveillance feeds and other information to border agents; and several segments of physical barriers.¹⁶⁸

The U.S. government tried to cast its use of technology in a favorable light, arguing that letting technology play a bigger role in border surveillance is a more humane approach to enforcement, as opposed to more heavy-handed solutions like the construction of a concrete wall along the entirety

¹⁶³ TRAC IMMIGRATION, *Immigration Prosecutions Increase With New Push for Border Enforcement*, <https://tracreports.org/reports/745/> [https://perma.cc/3JB3-YSX4] (last visited Nov. 14, 2025).

¹⁶⁴ See, e.g., Mathew Feeney, *Walling Off Liberty: How Strict Immigration Enforcement Threatens Privacy and Local Policing*, CATO INSTITUTE (Nov. 1, 2018), <https://www.cato.org/policy-analysis/walling-liberty-how-strict-immigration-enforcement-threatens-privacy-local-policing> [https://perma.cc/2FXZ-SRM2]. See also, AM. C.L. UNION., *Customs and Border Protection’s (CBP’s) 100-Mile Rule 1* (2018), <https://www.aclu.org/documents/aclu-factsheet-customs-and-border-protections-100-mile-zone?redirect=immigrants-rights/aclu-fact-sheet-customs-and-border-protections-100-mile-zone> [https://perma.cc/BZ9C-JGEG].

¹⁶⁵ Erica Hellerstein, *Between the US and Mexico, A Corridor of Surveillance Becomes Lethal*, CODA (July 14, 2021), <https://www.codastory.com/authoritarian-tech/us-border-surveillance/> [https://perma.cc/2NPJ-E94G].

¹⁶⁶ See Tess Herdman, *How the CBP’s “Prevention Through Deterrence” Policy Contributes to Migrant Deaths at the U.S./Mexico Border*, LOND. SCH. OF ECON. HUM. RTS. (Aug. 10, 2023), <https://blogs.lse.ac.uk/humanrights/2023/08/10/how-the-cbps-prevention-through-deterrence-policy-contributes-to-migrant-deaths-at-the-u-s-mexico-border/> [https://perma.cc/7ALR-8ER4].

¹⁶⁷ DEP’T OF HOMELAND SEC., *Fact Sheet: DHS Continues to Strengthen Border Security, Reduce Irregular Migration, and Mobilize International Partnerships* (June 4, 2024), <https://www.dhs.gov/archive/news/2024/06/04/fact-sheet-dhs-continues-strengthen-border-security-reduce-irregular-migration-and> [https://perma.cc/PEH9-99QH].

¹⁶⁸ See Herdman, *supra* note 166.

of the U.S.-Mexico border.¹⁶⁹ Along these lines, in an opinion piece published in 2019, Representative James Clyburn (D-SC) argued in favor of investing in “drones, scanners, and sensors to create a technological barrier too high to climb over, too wide to go around, and too deep to burrow under” to create a more humane and just immigration system.¹⁷⁰ Other Democrats are also committed to “invest[ing] in smart border security” to reform the immigration system.¹⁷¹ However, this new “digital border wall,” as it has been dubbed by scholars and activists, is just as deadly as a physical one, since it continues to push migrants to take even greater risks on their journeys in order to avoid detection.¹⁷²

Indeed, the present-day use of surveillance technologies and physical barriers, designed to “prevent” and “deter” unauthorized entry into the United States, has made the journey into the United States all the more dangerous.¹⁷³ The various deterrence and surveillance policies at the border have resulted in the death of hundreds of migrants, deeming the United States-Mexico border the deadliest land route for migrants worldwide.¹⁷⁴ Migrants are forced to avoid heavily surveilled areas, including designated ports of entry, for fear of getting caught.¹⁷⁵ Instead, they choose to cross in isolated areas such as deserts, rivers, or mountains that are harder for Border Patrol agents to reach and surveil. However, this means that these areas are more dangerous, given their isolation and harsh geographic features.¹⁷⁶ According to a geospatial study conducted by researchers at the University of Arizona, there is a “significant correlation between the location of border surveillance technology, the routes taken by migrants, and the location of recovered human remains in the southern Arizona desert.”¹⁷⁷

Private Sector: Enabling Mass Surveillance at the Border and Beyond

The surveillance of immigrant communities and the systematic aggregation of their data have a long-standing historical foundation, extending back to the late nineteenth century.¹⁷⁸ From its early days, U.S. law enforcement has relied on surveillance as a means of exerting control, disproportionately targeting immigrant populations, who were frequently viewed as inherently suspect and in need of monitoring.¹⁷⁹ In the 1910s, Raymond Fosdick, a former New York City police administrator, introduced

¹⁶⁹ NO MORE DEATHS, *Left to Die: Border Patrol, Search and Rescue, & the Crisis of Disappearance* 5 (2021) http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/left_to_die_-_english.pdf [https://perma.cc/7VY3-B4L6].

¹⁷⁰ See, e.g., James E. Clyburn, *Border Security That Is Smart, Just and Merciful*, THE HILL (Jan. 29, 2019), <https://thehill.com/blogs/congress-blog/lawmaker-news/427307-border-security-that-is-smart-just-and-merciful/?rnd=1548741699> [https://perma.cc/7K7L-79GB].

¹⁷¹ NEW DEMOCRAT COAL., *New Dems Unveil New Plan to Secure the Border and Reform the Immigration System* (Aug. 25, 2025), <https://newdemocratcoalition.house.gov/media-center/press-releases/new-dems-unveil-new-plan-to-secure-the-border-and-reform-the-immigration-system> [https://perma.cc/3YSQ-8FXD]; see also Sahil Kapur, ‘Democrats for Border Security’ Task Force Seeks to Redefine the Party on Immigration, NBC NEWS (Mar. 12, 2024), <https://www.nbcnews.com/politics/congress/democrats-border-security-task-force-seeks-redefine-party-immigration-rcna143039> [https://perma.cc/Q6CA-3ACY].

¹⁷² See generally MIJENTE, ET AL., *The Deadly Digital Border Wall* (2021), https://notechforice.com/wp-content/uploads/2021/10/Deadly.Digital.Border.Wall_.pdf [https://perma.cc/24CC-HN8G].

¹⁷³ *Id.* at 6.

¹⁷⁴ IOM UN MIGRATION, *US-Mexico Border World’s Deadliest Migration Land Route* (Sep. 12, 2023), <https://www.iom.int/news/us-mexico-border-worlds-deadliest-migration-land-route> [https://perma.cc/G3RW-H59Q].

¹⁷⁵ MIJENTE, ET AL., *supra* note 172, at 6.

¹⁷⁶ *Id.*

¹⁷⁷ Samuel Norton Chambers, et al., *Mortality, Surveillance and the Tertiary “Funnel Effect” on the U.S.-Mexico Border: A Geospatial Modeling of the Geography of Deterrence*, 36 J. BORDERLANDS STUD. 443, 443 (2019); *Migrant Death Mapping*, NO MORE DEATHS, <https://nomoredeaths.org/migrant-death-mapping/> [https://perma.cc/VCQ8-TAAH] (last visited Nov. 14, 2025).

¹⁷⁸ See Matthew Guariglia, *How the Surveillance of Immigrants Remade American Policing*, TIME (Nov. 21, 2023), <https://time.com/6336882/police-surveillance-history/>.

¹⁷⁹ *Id.* (discussing the New York City Police Department’s use of informants and spies within immigrant enclaves). In 1895, New York City demolished the entire city block of Mulberry Bend, converting it into a wide-open park to displace and more easily surveil the Bend’s Chinese, Irish, and Italian immigrant enclaves for criminal activity. *Id.* Although characterized by some as the “foul core of New York’s slums” and “a vast human pig-sty,” contemporary analysis suggests that the Bend’s murder rate in the mid-nineteenth century was no higher than the city average, suggesting displacement and surveillance of the Bend was driven by nativist fervor. See JACOB RIIS, *HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK* 55–56 (1914); see Myles Zhang, *A Brief History of Mulberry Bend* (Oct. 21, 2018), https://www.myleszhang.org/2018/10/21/mulberry-bend-chinatown/#_ftnref [https://perma.cc/7YLT-7EA6] (citing Sarah Paxton, *The Bloody Ould Sixth Ward: Crime and Society in Five Points*, New York (Jun. 2012) (B.A. thesis, Ohio State University), <https://kb.osu.edu/server/api/core/bitstreams/f87e95d4-1fcd-537e-bebb-53b10e49ce5b/content>).

to the United States German techniques of mass data collection.¹⁸⁰ These practices, notably employed by the Berlin police, involved meticulous documentation of vast populations and served as a model for U.S. authorities.¹⁸¹ As the country moved westward, sparse and fragmented rural police bodies, overwhelmed by rapid territorial growth and fearful of growing immigrant populations, turned to private investigators and companies to fill enforcement gaps.¹⁸² These private entities introduced tactics that influenced state practices, such as the Bureau of Immigration Agents, who emulated private anti-vice activists to deport foreign-born prostitutes under the guise of moral regulation.¹⁸³

By the 1920s, the emergence of fingerprint identification technology further entrenched the state's capacity for surveillance, establishing a critical tool in the federal enforcement apparatus.¹⁸⁴ Through the accumulation of foreign criminal records, the U.S. government constructed a legal rationale for the deportation of immigrants, disproportionately targeting European and Mexican communities.¹⁸⁵ The historical precedent not only institutionalized a system of data-driven social management but also laid the groundwork for the sophisticated privatized surveillance infrastructure that relies on biometric technologies and defines contemporary immigrant enforcement.

The historical trajectory has seamlessly evolved into the present-day surveillance landscape, where private contractors and technology companies play a central role in expanding the U.S. government's surveillance apparatus and its ability to detect and prosecute unlawful entry. The private sector's involvement is far from incidental; it reflects a deliberate capitalization on the government's growing reliance on surveillance, a form of surveillance capitalism. Early 20th-century innovations included fingerprint identification technology, supported by companies producing ink kits and record-keeping systems, and devices like the "Detectifone," a sound recording device marketed to police by the Dictograph Products Company.¹⁸⁶ Such inventions enabled more efficient monitoring, documentation, and tracking of populations, while also creating lucrative opportunities for private firms. These early collaborations demonstrated how private firms could profit from law enforcement needs, paving the way for a more formalized relationship as technology advanced. By the mid-20th century, the increasing complexity of surveillance demands, driven by the rise of biometric tools and national security concerns, spurred the emergence of specialized companies providing sophisticated systems and infrastructure.¹⁸⁷

Today, major companies such as Elbit Systems, Andruil, Lockheed Martin, and Venntel have become central players, securing lucrative government contracts to deploy cutting-edge surveillance technologies along the U.S. border.¹⁸⁸ For example, in 2020, DHS awarded Andruil a contract to install solar-powered mobile surveillance towers equipped with cameras and thermal imaging, designed to provide real-time data to U.S. Border Patrol agents.¹⁸⁹ While the contract's total value was not disclosed, Andruil executives estimated its worth in the hundreds of millions.¹⁹⁰ While ICE published

180 See Guariglia, *supra* note 178.

181 *Id.*

182 Jacqueline E. Ross, *The Surveillance State and the Surveillance Private Sector: Pathways to Undercover Policing in France and the United States*, 40 L. & HIST. REV. 261, 262 (2022).

183 *Id.* at 266.

184 See *id.*

185 See *id.*

186 Brian Hochman, *The Birth of Spy Tech: From the 'Detectifone' to a Bugged Martini*, WIRED (Mar. 23, 2022), <https://www.wired.com/story/surveillance-history-wiretapping-brian-hochman/> [<https://perma.cc/W325-KHS9>].

187 David Lyon, *Surveillance*, 11 INTERNET POL'Y REV. 1673 (2022), <https://doi.org/10.14763/2022.4.1673> [<https://perma.cc/VT25-4SJ5>].

188 See TODD MILLER, *More Than a Wall: Corporate Profiteering and the Militarization of US Borders*, TRANSNAT'L INST. (2019), <https://www.tni.org/files/publication-downloads/more-than-a-wall-report.pdf> [<https://perma.cc/F9SN-DGKM>].

189 Louis Stone, *Andruil Raises \$200M, Wins Contract for Autonomous Surveillance Towers Along US-Mexico Border*, TECHCRUNCH (Jul. 6, 2020), <https://aibusiness.com/verticals/andruil-raises-200m-wins-contract-for-autonomous-surveillance-towers-along-us-mexico-border>.

190 Nick Miroff, *Trump Administration Hires Tech Firm to Build a Virtual Border Wall, an Idea Democrats Have Praised*, WASH. POST (Jul. 2, 2020), https://www.washingtonpost.com/immigration/trump-virtual-border-wall/2020/07/02/7b380490-b0ac-11ea-a567-6172530208bd_story.html [<https://perma.cc/ZD7J-YQXD>].

a Privacy Impact Assessment in 2020, asserting that it would stop using facial recognition systems to enforce immigration, it has launched a mobile application that allows agents to identify individuals in government databases by capturing a facial image with a smartphone.¹⁹¹ As noted by the Center on Privacy & Technology at Georgetown Law, “this statement would appear to still allow ICE to use face recognition to freely target roughly four in ten undocumented people who entered the country without inspection or any other immigrant who was alleged to be involved in any other crime, however minor.”¹⁹² Those offenses would justify scans of the faces of millions of Americans, including both native- and foreign-born individuals, regardless of their documentation status.¹⁹³

Additional multi-million-dollar contracts reflect DHS’s renewed commitment to surveillance in 2025. Most notable is its \$30 million contract with Palantir Technologies to deploy an AI-powered tracking software.¹⁹⁴ Further, DHS has awarded a \$9.2 million contract to Clearview AI to develop AI facial recognition.¹⁹⁵ DHS has awarded contracts to additional companies to employ concealment cameras¹⁹⁶ and to develop iris biometric recognition technology that allows ICE agents to identify subjects.¹⁹⁷ These companies now shape the surveillance landscape, driving the demand for their own technologies and perpetuating a cycle where private interests and public policy intersect.¹⁹⁸ Similar are CBP’s initiatives to streamline surveillance at the border. CBP is currently seeking resources to facilitate facial imaging of vehicle occupants at the border.¹⁹⁹ The \$6 billion appropriated in part to CBP to “[u]pgrade[] and procure[] [] border surveillance” assures CBP will meet its objectives.²⁰⁰ As the private sector profits, the government’s ability to identify and prosecute unlawful entry expands.

Beyond the physical border, the invasive reach of this technology extends into everyday life, far from the actual boundary. ICE has turned to aggressive surveillance methods, such as accessing state DMV databases to gather driver’s license photos and purchasing personal data related to credit scores and utility bills from private companies.²⁰¹ The information-sharing agreement between the Internal Revenue Service (IRS) and ICE has also allowed it to obtain taxpayer data and home addresses.²⁰² Well-known corporations like Microsoft, LexisNexis, Westlaw, Reuters, and Motorola Solutions have capitalized on these developments, earning billions in revenue by supplying data or setting up data

191 THE MARSHALL PROJECT, *Mobile Fortify*, <https://www.themarshallproject.org/records/19964-mobile-fortify> [https://perma.cc/A6NT-NK9G] (last visited Nov. 14, 2025); Letter from Edward Markey, Senator, to Todd Lyons, Acting Dir. of U.S. Immigr. and Customs Enf’t (Sep. 11, 2025), https://www.markey.senate.gov/imo/media/doc/letter_to_ice_on_mobile_facial_recognition_tech1.pdf [https://perma.cc/8MX8-9EL5]; U.S. DEP’T HOMELAND SEC., OFF. OF INSPECTOR GEN., *OIG-25-10, DHS Has Taken Steps to Develop and Govern Artificial Intelligence, But More Action is Needed to Ensure Appropriate Use* (2025), <https://www.oig.dhs.gov/sites/default/files/assets/2025-02/OIG-25-10-Jan25.pdf> [https://perma.cc/PPN8-EQM4].

192 Nina Wang, et al., *American Dagnet: Data-Driven Deportation in the 21st Century*, CTR. ON PRIV. & TECH. AT GEO. L. 65 (2022), https://americandagnet.org/sites/default/files/American_Dagnet_report_English_final.pdf [https://perma.cc/QV4J-66DP].

193 Linet Suárez, *Liberty at the Cost of Constitutional Protections: Undocumented Immigrants and Fourth Amendment Rights*, 48 U. MIAMI INTER-AM. L. REV. 153 (2017).

194 Steven Hubbard, *ICE to Use ImmigrationOS by Palantir, a New AI System, to Track Immigrants’ Movements*, AM. IMMIGR. COUNCIL (Aug. 21, 2025), <https://www.americanimmigrationcouncil.org/blog/ice-immigrationos-palantir-ai-track-immigrants/> [https://perma.cc/57TU-UBXD].

195 Thomas Brewster, *ICE To Pay Up To \$10 Million For Clearview Facial Recognition To Investigate Agent Assaults*, FORBES (Sep. 8, 2025), <https://www.forbes.com/sites/thomasbrewster/2025/09/08/ice-to-pay-10-million-for-clearview-facial-recognition-to-investigate-agent-assaults/> [https://perma.cc/NLE4-SUVF].

196 SAM.GOV, *Award Notice – Cameras* (Sep. 19, 2025), <https://sam.gov/workspace/contract/opp/adb2a7b16cd45868058f190e9ab670/view>.

197 SAM.GOV, *Sole Source Justification for an Award to Bi2 Technologies, LLC* (Sep. 25, 2025), <https://sam.gov/workspace/contract/opp/7154f3ea8c854859a9a58ab706a4ceb9/view>.

198 Alli Finn, et al., *DHS Open for Business: How Tech Corporations Bring the War on Terror to Our Neighborhoods*, ACTION CTR. ON RACE & THE ECON. 9 (2023), https://acrecampaigns.org/wp-content/uploads/2022/12/DHS-OPEN-FOR-BUSINESS_FINAL.pdf [https://perma.cc/B9HL-KSP3].

199 SAM.GOV, *RFI Land Vehicle Primary Zone Traveler Photo Capture Device* (May 29, 2025), <https://sam.gov/opp/cc2f974932a4dd88f8daf4e5882bb90/view>.

200 One Big Beautiful Bill Act, Pub. Law 119-21, § 90004, 139 Stat. 359, 359 (2025).

201 Nina Wang, et al., *supra* note 192, at 1, 14, 24; see Catie Edmondson, *ICE Used Facial Recognition to Mine State Driver’s License Database*, N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/us/politics/ice-drivers-licenses-facial-recognition.html>; see also Jacinta Gonzalez, et al., *Who’s Behind ICE? The Tech and Data Companies Fueling Deportations*, NAT’L IMMIGR. PROJ. & IMMIGRANT DEF. PROJ. 2 (2018), https://mijente.net/wp-content/uploads/2023/02/Who-is-Behind-ICE-The-Tech-and-Data-Companies-Fueling-Deportations_v4.pdf [https://perma.cc/69LA-C5QF].

202 Adriel Orozco, *District Court Greenlights ICE-IRS Agreement, Blurring Lines Between Civil Immigration Enforcement and Criminal Investigations*, AM. IMMIGR. COUNCIL (May 22, 2025) <https://www.americanimmigrationcouncil.org/blog/ice-irs-data-sharing-agreement-court/> [https://perma.cc/9YWW-FSS9].

fusion centers for the government.²⁰³ Even Amazon Web Services (AWS), through its cloud storage capabilities, has become integral to housing the vast troves of data collected by CBP and ICE, enabling them to store and analyze information on a massive scale.²⁰⁴

However, this shift toward digital and biometric surveillance is fraught with significant issues. Many of these technologies are prone to errors and malfunctions, leading to misidentifications and wrongful targeting of individuals.²⁰⁵ For instance, facial recognition software has been widely criticized for its high failure rates, particularly when used on people of color, raising serious concerns about racial bias and the ethics of such tools.²⁰⁶ Despite these flaws, the government continues to invest heavily in surveillance technologies, creating a feedback loop where the same companies that produce these technologies fuel the need for their ongoing development and deployment.²⁰⁷ This cycle perpetuates the use of problematic surveillance methods while entrenching an oppressive system of control over immigrant communities.

The reliance on faulty technology and the vast sums of public money invested in these systems demonstrate a troubling trend: as surveillance technologies become more embedded in immigration enforcement, the opportunity for abuse and overreach grows. This cycle of investment, driven by private contractors profiting from government contracts, will continue to reinforce the inequalities and vulnerabilities faced by immigrant populations, contributing to an ever-expanding surveillance state. The historical roots of mass data collection and biometric surveillance have, thus, evolved into a modern apparatus that not only invades privacy but also perpetuates systemic injustice through its inherent flaws and biases.

Inadequate Constitutional Protection at the Border Facilitates Mass Surveillance

The Fourth Amendment of the U.S. Constitution is designed to protect people against “unreasonable searches and seizures” and restricts searches by government agents that violate a reasonable expectation of privacy or that constitute a trespass.²⁰⁸ However, courts have carved

...courts have carved out multiple border search exceptions to the Fourth Amendment, which severely weaken its protections in border areas.

out multiple border search exceptions to the Fourth Amendment, which severely weaken its protections in border areas. For instance, under a concept known as the “sovereignty doctrine,” the Supreme Court ruled that people have a lower expectation of privacy at border crossings because the government has a vested

203 MIJENTE ET AL., *Thomson Reuters & Relx: Stop Fueling Ice’s Deportation Machine* (2019), https://www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Thomson-Reuters-RELX_v4.pdf [https://perma.cc/SZK7-9HJ4]; Sarah Lamdan, *When Westlaw Fuels ICE Surveillance: Legal Ethics in the Era of Big Data Policing*, 43 N.Y.U. R. L. & SOC. CHANGE 255, 256 (2019), <https://socialchangenyu.com/review/when-westlaw-fuels-ice-surveillance-legal-ethics-in-the-era-of-big-data-policing/> [https://perma.cc/V62J-UQWP].

204 Gonzalez et al., *supra* note 201, at 12–13. ICE also continues to surveil individuals at risk of detention. In 2024, ICE used electronic monitoring systems to surveil over 340,000 individuals. VERA INST. OF JUST., *People on Electronic Monitoring* 10 (2024), <https://vera-institute.files.svdcn.com/production/downloads/publications/Vera-People-on-Electronic-Monitoring.pdf?dm=1707151571> [https://perma.cc/RW54-AQ9C].

205 Nicol Turner Lee & Caitlin Chin-Rothmann, *Police Surveillance and Facial Recognition: Why Data Privacy Is Imperative for Communities of Color*, BROOKINGS (Apr. 12, 2022), <https://www.brookings.edu/articles/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/> [https://perma.cc/2YWX-2AL9].

206 NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software, NAT’L INST. OF STANDARDS & TECH. (May 18, 2020), <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software> [https://perma.cc/PH9H-GRAB]; see Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. OF MACH. LEARNING RSCH. 1 (2018); U.S. DEP’T OF HOMELAND SEC., *United States Immigration and Customs Enforcement – AI Use Cases* (July 2, 2025), <https://www.dhs.gov/ai/use-case-inventory/ice> [https://perma.cc/G2Q3-ZMRR].

207 Finn, *supra* note 198, at 3.

208 See generally *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Jones*, 565 U.S. 400 (2012).

interest in knowing who and what enters through its borders.²⁰⁹ In practice, that means that the government has broad authority to conduct searches of a person's body, vehicles, and mail entering the border without the need for a warrant or any showing of probable cause.²¹⁰ These searches apply equally to citizens and noncitizens, resulting in a diminished expectation of privacy for all individuals crossing the border.

Functioning in tandem with the border search exception is CBP's "100-mile rule" that grants border agents the authority to make use of enhanced powers even when they are not physically proximate to a border. Specifically, agents are statutorily authorized to conduct warrantless searches of people and vehicles up to 100 miles from any land or maritime border to check for contraband and enforce immigration law.²¹¹ Some of the country's largest cities—New York, Los Angeles, Chicago, Houston, Phoenix, San Antonio, and San Diego—are within 100 miles of the U.S. border. Two-thirds of the U.S. population and several states lie entirely within this area, including Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.²¹² These enhanced investigatory powers indirectly facilitate and encourage the deployment of surveillance technologies and aggressive enforcement in border regions, further entrenching laws like Sections 1325 and 1326.

The Supreme Court has addressed concerns about the use of long-term surveillance in cases in recent years and is continuing to address these issues as new technology emerges. Notably, in *United States v. Jones*, Justice Sotomayor expressed grave concern regarding technological advances and the impact this may have on the freedom of movement stating, "Awareness that the government may be watching chills associational and expressive freedoms... the government's unrestrained power to assemble data that reveals private aspects of identity is susceptible to abuse."²¹³ In *Carpenter v. United States* the Court held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI [cell site location information]."²¹⁴ CSLI allows police to access historical data to track past movements, even before an investigation would have begun.²¹⁵ This ruling affirmed that even in the digital age, individuals have a right to privacy in their physical movements, as historical tracking of a person's location without a warrant can constitute a Fourth Amendment violation.

While the Supreme Court has not addressed the specific issue of surveillance technologies at the border, it is clear that there are emergent Fourth Amendment concerns for both citizens and noncitizens alike, as these technologies are deployed in the name of immigration enforcement. The Department of Justice's latest expanded interpretation of Section 1325 violations, which defines eluding inspection as a continuing offense, raises concerns about the reach of immigration enforcement and its surveillance power.²¹⁶

Section 1325 and 1326 prosecutions, and the underlying impetus to detect irregular border crossings, create a powerful incentive for the use of surveillance technologies that impact citizens and

209 See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *United States v. Flores-Montano*, 541 U.S. 149 (2004).

210 See *United States v. Ramsey*, 431 U.S. 606 (1977); *United States v. Montoya-Hernandez*, 473 U.S. 531 (1985); *United States v. Flores-Montano*, 541 U.S. 149 (2004).

211 See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); 8 U.S.C. § 1357(a) (3); 8 C.F.R. § 287.1(b); see also Chris Rickerd, *ACLU Factsheet on Customs and Border Protection's 100-Mile Zone*, AM. C.L. UNION (2014), <https://www.aclu.org/documents/aclu-factsheet-customs-and-border-protections-100-mile-zone> [https://perma.cc/JW2P-7QBA].

212 AM. C.L. UNION, *Know Your Rights: 100 Mile Border Zone*, <https://www.aclu.org/know-your-rights/border-zone> [https://perma.cc/Y2MT-JBXW] (last updated Sept. 5, 2025); Rickerd, *supra* note 211.

213 656 U.S. 400, 416 (2012).

214 585 U.S. 296, 310 (2018).

215 *Id.* at 301.

216 Op. O.L.C., *supra* note 13.

noncitizens alike. The rights of noncitizens and migrants are especially at risk, leaving them more vulnerable to potential abuse and exploitation.²¹⁷ Consequently, given that the courts have not kept up with the development of investigative surveillance technologies, this raises concerns about privacy and legal oversight.²¹⁸ The absence of clear rules about how law enforcement can use new surveillance tools, such as facial recognition, will make it harder to protect citizens' rights as these technologies become more common in law enforcement. As Kade Crockford, the director of the Technology for Liberty Program at the ACLU of Massachusetts, once stated, "Technology has outpaced our civil rights law."²¹⁹

CONCLUSION

The persistence of 8 U.S.C. § 1325 and § 1326 is not only a reflection of outdated and racially motivated policies but also a testament to how these provisions have evolved into tools of systemic harm. Born out of nativist and eugenicist ideologies, these laws continue to disproportionately target Mexican and Latino migrants, subjecting them to harsh criminal penalties in addition to civil immigration sanctions. While the policies were framed as mechanisms for controlling immigration, they have become instruments of punishment, exacerbating the vulnerabilities of undocumented noncitizens and their families.

These statutes have also become entangled with the profit-driven motives of the private detention and surveillance industries. Through privatized immigration detention, companies like CoreCivic and GEO Group directly benefit from policies that fill quotas, lobby for harsher immigration enforcement, and drive up incarceration rates. This convergence of criminal prosecution and privatization creates a cycle where noncitizens are criminalized, detained, and processed for profit, reinforcing a system that prioritizes corporate gain over human rights.

Furthermore, the entrenchment of mass surveillance technologies by DHS and its private partners has expanded the reach of these harmful policies. The growing collaboration between the government and technology companies like Amazon Web Services and Anduril has resulted in a sophisticated surveillance infrastructure that not only invades the privacy of noncitizens but also contributes to the broader erosion of civil liberties. These companies, with their financial stake in the continuation of immigration enforcement, perpetuate the need for strict border controls and mass data collection, further embedding sections 1325 and 1326 in the fabric of immigration policy.

Ultimately, the repeal of 8 U.S.C. § 1325 and § 1326 is not only necessary to dismantle the relics of a racist past but also to confront the ongoing exploitation of migrants under the guise of law enforcement. The intertwined interests of private detention companies, surveillance technology providers, and the government have created a dangerous nexus where profit incentives override considerations of fairness, justice, and human dignity. Repealing these statutes is a crucial first step toward decriminalizing migration, reducing the harmful impacts of privatization, and restoring a system that prioritizes humane immigration policy over corporate profits. Without such action, the cycle of oppression, exploitation, and criminalization will continue unabated, perpetuating harm against those who are already marginalized.

²¹⁷ Inma Sumaita, *Losing Dignity: Eroding Privacy Rights of Immigrants in Technology-based Immigration Enforcement*, 6 U. CIN. INTELL. PROP. & COMPUTER L.J. 1, 5 (2022) ("The Fourth Amendment became somewhat more pliable in criminal cases involving immigrants in *United States v. Verdugo-Urquidez*, where the United States Supreme Court reversed the order granting defendant's motion to suppress evidence seized during a search of their residence in Mexico.").

²¹⁸ See generally Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L. J. 125 (2015).

²¹⁹ AM. C.L. UNION MASS., *We are Suing the FBI to Find out How They Use Face Surveillance Technology* (Oct. 31, 2019), <https://www.aclum.org/press-releases/we-are-suing-fbi-find-out-how-they-use-face-surveillance-technology/> [https://perma.cc/R74L-46F9].

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